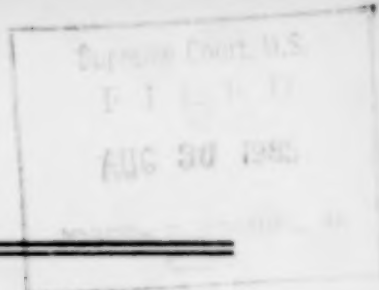


No. 84-495



**In The
Supreme Court of the United States
October Term, 1985**

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

**On Appeal from the United States
Court of Appeals for the Third Circuit**

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether this Court's mandatory appeal jurisdiction under 28 U.S.C. § 1254(2) requires it to review a non-final order of the court of appeals, reversing in part the district court's order largely denying appellees' application for a preliminary injunction against enforcement of the Pennsylvania Abortion Control Act.

2. Whether the court of appeals applied the proper standard of review when, upon concluding that the district court used an erroneous legal standard, it found that the principles set forth in this Court's decisions compelled the conclusion that certain sections of the Pennsylvania Abortion Control Act are unconstitutional on their face.

3. Whether the court of appeals properly concluded, in light of this Court's prior decisions, that sections of the Pennsylvania Abortion Control Act requiring that specific information be provided to secure the woman's informed consent, prescribing the choice of abortion method and the standard of care for post-viability abortions, requiring the presence of a second physician for all post-viability abortions, and requiring the filing and public disclosure of detailed reports regarding abortions are unconstitutional.

4. Whether the court of appeals' holding that the provisions of the Pennsylvania Abortion Control Act requiring parental consent or judicial authorization for abortion by a minor cannot be enforced until the Pennsylvania Supreme Court promulgates rules to implement the judicial authorization provisions is moot in light of the promulgation of those rules.

5. Whether the constitutionality of the Pennsylvania Supreme Court rules implementing the judicial authorization provisions of the Pennsylvania Abortion Control Act should first be considered by the district court, and, if not, whether those rules would result in an unconstitutional infringement of minors' fundamental right to abortion, requiring that the parental-judicial consent provisions of the Act be enjoined.

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STATEMENT

This is an appeal from an interlocutory order of the United States Court of Appeals for the Third Circuit. The court of appeals reversed an order of the United States District Court for the Eastern District of Pennsylvania largely denying a request for a preliminary injunction against enforcement of the Pennsylvania Abortion Control Act, 18 PA. CONS. STAT. ANN. §§ 3201-20 (Purdon 1983) (the "Act"), and remanded the matter for further proceedings consistent with its opinion. The procedural history of the case is set forth in the Brief for Appellants at pages 4 through 9.

In 1974, the Pennsylvania General Assembly enacted the state's first Abortion Control Act over the governor's veto. No. 209, 1974 Pa. Laws 639 (repealed) (formerly codified at 35 PA. STAT. ANN. §§ 6601-08 (Purdon 1977)). After five years of litigation, many of the provisions of this statute were finally held unconstitutional, including provisions requiring spousal or parental consent, regulating the choice of abortion method for post-viability abortions, and banning advertisements for abortion. *See Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 544 (E.D. Pa. 1975) (three-judge court), *aff'd mem. in part sub nom. Franklin v. Fitzpatrick and vacated and remanded mem. in part sub nom. Beal v. Franklin*, 428 U.S. 901 (1976), *modified on remand*, No. 74-2440 (E.D. Pa., September 16, 1977) (unreported), *aff'd sub nom. Colautti v. Franklin*, 439 U.S. 379 (1979); *see also Doe v. Zimmerman*, 405 F. Supp. 534 (M.D. Pa. 1975) (three-judge court). In 1978 the Pennsylvania legislature attempted to restrict access to abortion by severely limiting medical assistance funding for abortions. This effort was also found unconstitutional by the court of appeals. *Roe v. Casey*, 623 F.2d 829 (3d Cir. 1980).

In 1981, members of the House of Representatives again introduced legislation aimed at limiting abortion, based on a model statute developed by Americans United for Life, a Chicago-based anti-abortion organization. H. 1725, 1981 Sess., Pa. General Assembly; see Note, 87 DICK. L. REV. 373, 382 n.84 (1983). Although rejected by the relevant legislative committee, 38 PA. L.J.-REP. 1 (1981), the bill was brought to the House floor as an "amendment" to a bill regulating "tough-guy" competitions. S. 742, 1981 Sess., Pa. General Assembly. The initial version of the bill was then amended to eliminate such blatantly unconstitutional provisions as one that allowed any person, agency or association, on behalf of the "unborn child," to seek an injunction against any individual believed to be in violation of the Act.¹ Nevertheless, Pennsylvania's Governor, Dick Thornburgh, vetoed the bill on December 23, 1981, stating:

I am concerned that some of the detailed, complex and burdensome requirements of the bill, accompanied as they are by severe criminal penalties, could well foster an atmosphere in which many physicians would be deterred from providing the kind of abortion-related medical services to which the U.S. Supreme Court has held their patients are constitutionally entitled. This could well disrupt the traditional doctor-patient relationship and impinge upon the right of physicians to practice. Of even greater concern is the potential for more experienced and conscientious phy-

1. The bill's original version also contained the following: (1) a requirement that detailed color photographs of dead aborted fetuses be made available to the woman prior to an abortion; (2) a requirement that dead aborted fetuses be disposed of under laws for disposal of dead persons and that death certificates be issued after each abortion; (3) a requirement that the woman notify the father prior to an abortion (whether or not her husband); and (4) a provision prohibiting in vitro fertilization conducted for purposes other than subsequent implantation. H. 1725, 1981 Sess. §§ 5, 7, 8, 12(d), 13(i). See Note, 87 DICK. L. REV. 373, 382 n.84 (1983).

sicians to refrain from involvement in even medically necessary abortions, and to abandon the field to marginal practitioners. It could even lead to a resurgence of "back alley" abortions, which no thoughtful person would wish to happen.

Veto Message to the Senate (Dec. 23, 1981), *quoted in American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 737 F.2d 283, 289 n.4 (3d Cir. 1984).

After some revision, the Abortion Control Act was again introduced on the floor of the House on June 8, 1982, this time as an amendment to a bill regulating paramilitary training. After passage by the General Assembly, this new version was signed by the Governor on June 11, 1982, to become effective December 8, 1982. As stated by the chief sponsor and leader of the floor debates when initially explaining the bill at a news conference:

Look, we can't stop abortions. The message we are sending to doctors is this: We can't stop you from performing abortions. We wish we could, and we hope to God that some day we'll get the Human Life Amendment so we can. But until that time there are going to be regulations you'll have to follow if you are going to perform abortions.

Remarks of Rep. Stephen Friend *quoted at* 737 F.2d 288.

SUMMARY OF THE ARGUMENT

I. Although conceding that the order of the court of appeals is not final, appellants bring this matter as an appeal, invoking 28 U.S.C. § 1254(2). This Court has routinely held that appeals from cases before the courts of appeals challenging the constitutionality of a state statute can be brought only from final orders, despite the absence of language compelling finality in the statute. That finality requirement is consistent with the statute's legis-

lative history, the congressional policy of reducing the mandatory docket of this Court and the sound rule against piecemeal appeals. Appellants have presented no policy considerations sufficient to override this finality requirement, and, accordingly, the appeal should be dismissed.

II. The court of appeals correctly concluded that the district court, in ruling upon an application for preliminary injunction, applied an erroneous legal standard, particularly in light of this Court's decisions issued after the district court's original order but prior to the decision of the court of appeals. Exercising its plenary scope of review on questions of law and applying the proper legal standard, the court of appeals concluded that certain sections of Act were unconstitutional on their face. Since no factual presentation could alter this obvious unconstitutionality, the court of appeals appropriately reached the merits with respect to these sections.

III. A. In order for the consent of a woman seeking an abortion to be deemed "informed," Sections 3205 and 3208 of the Act mandate that certain pieces of information be provided to all women in all cases. Appellants have conceded that the physician-only counseling and the 24-hour waiting period requirements of Section 3205 are unconstitutional. The court of appeals also properly recognized that the specific informational requirements cannot be sustained. These requirements are plainly designed not to inform the woman's consent but rather to discourage her from having an abortion. By forcing the physician or counselor to deliver a message prescribed by the Commonwealth, and by specifying a litany of information that must be provided irrespective of the woman's circumstances, these requirements unconstitutionally intrude upon the physician's discretion.

B. Section 3210(b) of the Act compels a physician performing a post-viability abortion to choose the medical procedure that would provide the best opportunity for the fetus to be born alive unless that procedure would present a "significantly greater medical risk to the life or health of the pregnant woman" than another procedure. This criminal provision also prescribes the standard of care that must be employed in post-viability abortions. The plain language of the statute would compel the physician to elevate potential life over the life and health of the woman in contravention of the fundamental constitutional right recognized by this Court's decisions. Since this plainly unconstitutional requirement cannot be eliminated by any reasonable construction of the statute, Section 3210(b) must fall.

Moreover, both the choice of technique and the standard of care prescriptions impose criminal liability for a series of determinations by the physician that are, at best, imprecise. Section 3210(b) thus fails to give the physician fair notice of what medical decisions may contravene the statute, encouraging arbitrary prosecutions and threatening to inhibit the exercise of constitutionally protected rights. This section is unconstitutionally vague and must be stricken.

C. Section 3210(c) of the Act requires the attendance of a second physician for post-viability abortions. On its face, this criminal provision does not allow an exception when the attendance of a second physician cannot be secured because of a medical emergency. Appellants' contention that a medical emergency exception can be construed from language in a separate subsection of Section 3210 cannot be squared with other sections of the Act that provide express exceptions for medical emergencies. The absence of an express medical emergency exception in

Section 3210(c) was intentional, and the provision is therefore unconstitutional.

D. The Act requires that numerous reports containing highly detailed information about individual abortion procedures, complications and maternal deaths be filed and be made available for public inspection and copying. In proceedings after remand, the district court concluded that public disclosure of reports not enjoined by the court of appeals would increase the frequency and intensity of acts of violence and harassment directed against women seeking abortions and abortion providers by opponents of abortion, and that appellants failed to justify this intrusion upon the exercise of fundamental constitutional rights. These conclusions strongly support the decision by the court of appeals enjoining some of the reporting and public disclosure requirements because they unconstitutionally burden the woman's exercise of her fundamental right to choose an abortion.

E. Section 3206 of the Act requires that an unemancipated minor woman must obtain the consent of her parent or guardian or petition the court for authorization before she may have an abortion. The court of appeals concluded that Section 3206 withstood a facial challenge to its constitutionality, but enjoined enforcement of the section until the Pennsylvania Supreme Court promulgated procedural rules to implement the provision. In November, 1984, rules were promulgated, and, accordingly, this aspect of the appeal is moot. However, the question of whether those rules establish a constitutional procedure must be determined before this section can be permitted to take effect. That determination should be made initially by the district court.

F. If the Court considers their adequacy, the rules must be found unconstitutional. They deprive the minor

woman of a procedure free from parental involvement by according an absolute right to the minor's parents to attend the judicial hearing. The rules fail to provide for the appointment of counsel in all instances, which may deprive the minor woman of an effective opportunity to establish her case before the court. While authorizing the appointment of a guardian ad litem, the rules fail to define the circumstances when an appointment can be made or the role of the guardian once appointed. Accordingly, they threaten the possibility of a third party exercising an arbitrary veto over the minor's decision.

Thus, this Court should dismiss the appeal for want of jurisdiction, treat the appeal as a petition for writ of certiorari, and deny certiorari. Alternatively, if the Court reaches the merits, it should affirm the decision of the court of appeals in all respects.

O

ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. § 1254(2) To Review A Portion Of An Interlocutory Order Of The Court Of Appeals, And The Appeal Must Be Dismissed.

In an appeal from an interlocutory order of the district court largely denying appellees' request for a preliminary injunction, the court of appeals partially reversed that order and remanded the matter for further proceedings consistent with its opinion. The court of appeals did not direct the entry of judgment for appellees on any issue, recognizing that further proceedings before the district court will take place before a final decree can be entered.² Accordingly, as appellants concede, the order

2. Indeed, the district court has been twice called upon to consider issues in this case since the court of appeals' decision. See J.A. 57a-61a; Addendum to Brief for Appellees ("Addendum") at 1a-37a.

of the court of appeals is not final. Brief for Appellants at 21.

In *Slaker v. O'Connor*, 278 U.S. 188 (1929), this Court established that finality was required for appeals brought under the predecessor to 28 U.S.C. § 1254(2), Section 240 (b) of the amended Judicial Code of 1925, Act of February 13, 1925, Pub. L. No. 415, 43 Stat. 936, despite the absence of express language requiring finality. The finality requirement was applied to Section 1254(2) itself in *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901 (1956) (*per curiam*), and has not since been disavowed. Indeed, appellants concede that *Slaker* is controlling here, but contend that it should be overruled. Brief for Appellants at 22-25. That contention is without merit.

As early as 1891, this Court established a finality requirement for mandatory appeals under jurisdictional statutes that contained no explicit finality language. *McLish v. Roff*, 141 U.S. 661 (1891):

From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. *Forgay v. Conrad*, 6 How. 201, 204. The construction contended for [that finality is not required] would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed.

• • •

But there is an additional reason why the omission of the word *final*, in the 5th section of the act should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in

the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally . . . to those [cases] in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. . . . The effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, with all the matters in controversy in it, by awaiting the final judgment, could be promptly decided in one appeal.

Id. at 665-67 (emphasis in original).

In 1925, Congress presumably intended the rule of *McLish* to apply when it enacted the predecessor to Section 1254(2) without an express finality requirement. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law."). This is confirmed by the legislative history of Section 240(b), which originated as an amendment to the Judges' Bill of 1925. 43 Stat. 936, 938. That statute, drafted by Justices of the Supreme Court out of concern for their burdensome caseload, drastically reduced the mandatory appellate jurisdiction of the Court. See Simpson, *Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court*, 6 HASTINGS CONST. L.Q. 297, 328 (1978).

The bill, which passed with little debate in the House of Representatives, was amended in the Senate to include Section 240(b) to retain a limited right of mandatory appeal from the courts of appeals. 66 CONG. REC. 2750-57, 2916-28 (1925); see also F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 273-79 (1928). The intention was to put appeals from the courts of appeals and the state courts, "on a perfect parity, allowing a writ of error from the circuit court of appeals under condi-

tions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious." 66 CONG. REC. 2923 (Senator Walsh), *quoted in* FRANKFURTER & LANDIS, *supra* at 278. The statute with which Section 240(b) was to be on parity expressly required that appeals could be taken only from a final judgment or decree. 43 Stat. 936, 937, § 237(a) (now 28 U.S.C. § 1257).

The congressional policy of restricting the mandatory docket of the Court recognized in *McLish v. Roff* is still vital. *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974); *Flanagan v. United States*, 465 U.S. 259 (1984).³ The Court has followed this policy in its strict interpretation of jurisdictional statutes authorizing appeals, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983), and has, due to its burgeoning caseload, recently called for further restrictions, including elimination of all mandatory appeals from the courts of appeals.⁴

Most recently Congress reaffirmed this policy by limiting the jurisdiction of three-judge district courts.⁵ As a result, cases challenging the constitutionality of state statutes will be routed from the district courts to the courts

3. This Court has recognized 28 U.S.C. § 1252, which explicitly allows review of an interlocutory order, as an exception to the policy of minimizing the mandatory docket of the Supreme Court, *McLucas v. Champlain*, 421 U.S. 21, 31 (1975), but has discouraged analogizing from § 1252 to § 1254(2), which it has interpreted much more strictly. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621 n.10 (1984).

4. See *Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights; Hearings before the Subcom. on Courts, Civil Liberties, and the Administration of Justice of the House Committee of the Judiciary*, 97th Cong., 1st Sess. 22 (1982) (letter to Congressman Kastenmeier endorsing H.R. 2406).

5. See Act of August 12, 1976, Pub. L. No. 381, 90 Stat. 1119 (repealing 28 U.S.C. §§ 2281 and 2282).

of appeals under 28 U.S.C. §§ 1291 and 1292 and to the Supreme Court under Section 1254(2) rather than directly from three-judge district courts to this Court.⁶ Eliminating the finality requirement under Section 1254(2) would therefore subvert Congress' most recent effort to reduce the Court's caseload.

Also underlying the finality requirement is the "long established object and policy" of avoiding the expense and delay of piecemeal appeals, also recognized in *McLish v. Roff*. See *Abney v. United States*, 431 U.S. 651, 656-59 (1977); *City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949). The potential for piecemeal review if the finality rule is abandoned is well demonstrated by this case. Portions of the Act are before this Court; others are at various stages before the district court; still others are in effect pending a final hearing.⁷ If Section 1254(2)

6. The policy of insuring immediate appellate review of district court decisions granting (or denying) preliminary injunctions against enforcement of federal or state statutes is preserved by 28 U.S.C. § 1292(a)(1), authorizing immediate appeals to the courts of appeals. Thus, appellants reliance on the need for immediate appellate review as support for their interpretation of § 1254(2) is unwarranted. Brief for Appellants at 29.

7. Sections 3205, 3206, 3208, 3210(b), 3210(c), 3211(a) and 3214(a), (b), (e), (g) and (h) are currently before this Court; § 3209 and the 24-hour waiting period and physician-only counseling provisions in § 3205 were conceded by appellants before the court of appeals but reserved for further litigation; the court of appeals holding that § 3215(e) is unconstitutional was not appealed to this Court but reserved for further litigation. Since the court of appeals' ruling, the public disclosure requirements in §§ 3207(b) and 3214(f) were the subject of a full evidentiary hearing on appellees' renewed motion for a preliminary injunction. Sections 3203 and 3210(a) were construed by the court of appeals to avoid constitutional problems. Section 3215(c) is the subject of a separate state court action, and has been partially enjoined. *Fischer v. Department of Public Welfare*, 85 Pa. Commw. 215, 239-40, 482 A.2d 1137, 1148 (1984), appeal docketed, 67 M.D. App. Dock. (Pa. S.Ct.). The remaining sections of the Act have become operative.

mandates that this appeal be heard, then the jurisdictional provision will operate to delay a final hearing with a high likelihood that the case may return to this Court one or more times in the future. It is inconceivable that the mere absence of the word "final" bespeaks Congress' intent to depart so dramatically from sound policy and precedent. Thus, the appeal must be dismissed.⁸

II. The Court Of Appeals Applied The Appropriate Standard Of Review In Reversing The District Court's Denial Of A Preliminary Injunction In Light Of This Court's Intervening Decisions.

Between the time of the district court's ruling on the motion for preliminary injunction and review by the court of appeals, this Court decided *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) ("*Akron*"); and *Planned Parenthood Ass'n, Inc. v. Ashcroft*, 462 U.S. 476 (1983) ("*Ashcroft*"). Given the similarity of the statutory provisions at issue here to those rejected by this Court in these intervening cases, it was clear that the district court applied the wrong legal principles when determining the likelihood of appellees' success on the merits. Applying the appropriate standard of review, the court of appeals was compelled to reverse the decision of the district court in many respects.

The standard of appellate review of a grant or denial of a preliminary injunction is whether the lower court has abused its discretion. See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). A district court never has discretion to apply the wrong legal standard. *Charles v. Carey*, 627 F.2d 772, 776 (7th Cir. 1980); *Planned Parenthood League*

8. The Court should therefore decline appellants' request that this matter be heard on writ of certiorari. Moreover, none of the reasons for which certiorari is generally granted under Rule 17 is present here. See Appellees' Motion to Dismiss or Affirm at 10-14.

v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981). Therefore, a ruling on an application for a preliminary injunction must be reversed "if the trial court ~~has~~ abused its discretion or committed error in applying the law." *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1242 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984), (citing *Kennecott Corp. v. Smith*, 637 F.2d 181, 187 (3d Cir. 1980)); see also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938).

Appellants contend that the court of appeals exceeded the proper scope of review by addressing the merits of the underlying constitutional issues. However, where the district court has proceeded on the basis of an erroneous view of the applicable law and where, as here, application of the correct rule compels a resolution of the ultimate issues, the court of appeals may reach the merits. As the court concluded in *Delaware & Hudson Ry. v. United Transportation Union*, 450 F.2d 603, 620 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971):

The duty to appraise the merits at the stage of preliminary injunction is a duty of appellate as well as trial courts. Usually this appraisal is phrased in terms of probability or substantial likelihood of success after trial. Sometimes, however, the interest of justice is furthered by providing a determination on the merits, both at the trial court and on appeal, if and to the extent that the matter is ripe, notwithstanding that technically the only matter submitted is a request for a preliminary injunction. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

Insofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court. The matter stands in a different posture from that involved when there is no question or disagreement as to the

legal principle involved, and the element of probability of success on the merits depends on a forecast as to the shape of the facts likely to emerge at trial. If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound.

The court of appeals did no more when it found that certain provisions of the Act were plainly unconstitutional on their face under *Akron* and *Ashcroft*. Accordingly, a decision on the merits with respect to these issues was fully warranted.

Appellants complain that they did not have a sufficient opportunity to develop a factual record before the district court. This argument ignores, however, that the court of appeals reached the merits only in those limited instances where no set of facts could alter the result. See *Tustin v. Heckler*, 749 F.2d 1055, 1060 (3d Cir. 1984). In any event, appellants had ample time to develop a record before the district court, far in excess of that typically accorded defendants when preliminary relief is sought. Appellants knew that preliminary relief would be sought eight weeks before the hearing on the motion for preliminary injunction, and for five weeks they knew the precise factual and legal contentions supporting that request.⁹ During the period between the filing of appellees' motion and the hearing on that motion, an answer to the complaint was filed by some appellants, others moved to dismiss the complaint as to them, and all appellants filed a memorandum of law opposing a preliminary

9. The complaint, in which appellees requested a preliminary injunction, was filed on October 4, 1982. (J.A. 1a). Appellants filed their motion for preliminary injunction, together with supporting factual affidavits and a memorandum of law, on October 29, 1982. (J.A. 1a). The hearing on the preliminary injunction application did not occur until December 2, 1982. (J.A. 2a).

injunction. Thus, beyond being irrelevant to the court of appeals' decision, the absence of any evidentiary record to support appellants' contentions stems from their own failure to assemble and to adduce that evidence.

Indeed, the preview of evidence that appellants intend to present shows that they cannot create a record that would alter the court of appeals' findings. Brief for Appellants at 45-47. Some of that evidence was already part of the record on the motion for preliminary injunction.¹⁰ Other evidence is plainly irrelevant to any consideration of the constitutionality of the sections involved.¹¹ Still other evidence relates solely to issues that appellees agree should first be presented to the district court.¹² Thus, to the extent the court of appeals reached the merits with respect to provisions now before this Court, its decision was fully warranted and should be affirmed.¹³

10. For example, the fact that women in Pennsylvania are not currently provided with all of the information required by § 3205 to secure their informed consent was part of the stipulated record on the preliminary injunction. (J.A. 44a).

11. For example, the fact that there may be abortion techniques that offer "a far greater chance for survival of the fetus" than other techniques cannot support § 3210(b) which, on its face, compels the physician to elevate potential life over the life and health of the woman. Nor can "the characteristics of viable fetuses" justify § 3210(c) which compels the presence of a second physician in a post-viability abortion even when a medical emergency exists.

12. The question of the constitutionality of the Pennsylvania Supreme Court rules implementing the judicial authorization procedure in § 3206 of the Act should be considered by the district court on the basis of a record to be developed by that court. See § III.E., *infra*.

13. As outlined below, this Court's prior decisions compel a finding that the sections of the Act at issue must be enjoined at least until a final hearing in the district court. Accordingly, if this Court should conclude that the court of appeals exceeded the proper scope of review in reaching the merits on these sections, the appropriate course is to remand the matter with an instruction that the sections at issue be enjoined pending a final hearing.

III. The Court Of Appeals Applied The Correct Principles When Assessing The Constitutionality Of The State Regulation Of Abortion At Issue In This Appeal.

Appellants and appellees agree that the court of appeals was correct in applying the principles of *Roe v. Wade*, 410 U.S. 113 (1973) ("*Roe*"), when assessing the constitutionality of the Act. Appellants have not asked this Court to re-examine those principles, and there is no sound reason to do so in light of the recent and unequivocal reaffirmation of a woman's fundamental right to choose abortion in *Akron* and *Ashcroft*.¹⁴ Should this Court reach the merits of this appeal, the only question presented is whether the court of appeals properly applied these principles in reaching its decision as to the constitutionality of sections of the Act. As discussed below, that question must be answered in the affirmative.

A. The Informed Consent Provisions Of Sections 3205 And 3208 Unconstitutionally Interfere With The Physician-Patient Relationship And Attempt To Discourage Women From Choosing Abortions.

Like the ordinance at issue in *Akron*, Sections 3205 and 3208 of the Act prescribe in detail the manner for securing the woman's informed consent to an abortion during all trimesters of pregnancy. Seven explicit cate-

14. In *Akron*, the Court concluded that there are "especially compelling reasons" for adhering to the principles of *Roe*, noting:

That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

462 U.S. at 420 n.1.

gories of information must be presented to the woman 24 hours before her consent is obtained, and five of these must be presented by the woman's physician. The physician or counselor must also inform the woman that materials printed by the Commonwealth that "describe the unborn child and list agencies which offer alternatives to abortion" are available for her review. If she chooses to review the materials and is unable to read them herself, the physician or counselor must do so and must answer any questions concerning them, in the woman's own language. Section 3208 requires that these printed materials include the following statement:

There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

The materials must describe the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival." *Id.*¹⁵

Appellants conceded before the court of appeals that the physician-only counseling and the 24-hour waiting period requirements of Section 3205 are unconstitutional in light of this Court's decision in *Akron*. 462 U.S. at 446-51. The court of appeals further concluded that the spe-

15. The possibility of fetal survival is not easily nor accurately ascertainable. See nn. 22, 25, 31, *infra*. No matter how "objective" or "non-judgmental" the presentation, this information will, at a minimum, confuse the woman.

cific informational requirements must fall under the reasoning of *Akron*.

Relying on its prior decision in *Planned Parenthood v. Danforth*, 428 U.S. 52, 65-67 (1976) ("*Danforth*"), the Court in *Akron* concluded that, "[t]he validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman." 462 U.S. at 443. The Court cautioned:

This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to insure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth's* recognition of the State's interest in insuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.

462 U.S. at 443-44 (footnote omitted).

The informational requirements in the Akron ordinance were unconstitutional for two "equally decisive" reasons. First, "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." 462 U.S. at 444. Second, the rigid requirement that a specific body of information be given in all cases, irrespective of the needs of the patient, intruded upon the discretion of the physician thereby imposing the "undesired and uncomfortable strait-jacket" warned against in *Danforth*. 428 U.S. at 67 n.8. Each of these independent reasons apply with equal force to the specific informational requirements at issue here.

The printed materials required by Sections 3205 and 3208 are a bald attempt to force the Commonwealth's message discouraging abortion into the privacy of the in-

formed consent dialogue. The mandated description of fetal characteristics at two-week intervals, no matter how objective, is plainly overinclusive. Even if tailored to the gestational age of the particular fetus, this is not medical information that is always relevant to the woman's decision; as such, it may only serve to confuse and heighten her anxiety contrary to accepted medical practice. (J.A. 45a-46a). See *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1021-22 (1st Cir. 1981).¹⁶ Even the list of agencies contained in the printed form presents serious problems for the physician. The list may contain agencies that are inappropriate to the needs of the patient, placing the physician in the awkward position of discouraging referrals to agencies endorsed by the Commonwealth.¹⁷

Requiring that the physician or counselor only inform the woman of the availability of the printed materials,

16. Like this Court in *Akron* and the First Circuit Court of Appeals in *Bellotti*, lower courts have consistently stricken fetal description requirements because of their inflammatory impact. See *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980); *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 868 (8th Cir. 1981); *Women's Medical Center v. Roberts*, 530 F. Supp. 1136, 1152-54 (D.R.I. 1982); *Leigh v. Olson*, 497 F. Supp. 1340, 1346-47 (D.N.D. 1980).

17. In November, 1982 the Pennsylvania Department of Health developed a list of agencies as required by § 3208. Some of the agencies, such as People Concerned for the Unborn Child in Pittsburgh, Pennsylvania and Citizens Concerned for Human Life in State College, Pennsylvania, are primarily engaged in anti-abortion political activity; other agencies, such as Love the Children in Quakertown, Pennsylvania, a Korean adoption agency, provide no services for pregnant women; still others, such as Birthright, located in many counties of Pennsylvania, provide highly inflammatory and medically inaccurate literature. In at least one instance, the listed "agency," St. Gabriel's Respect Life Group in Drums, Pennsylvania, is the private residence of an individual who is the president of a local chapter of Pennsylvanians for Human Life. Pa. Dept. of Health, Directory of Social Service Organizations As Required By The Abortion Control Act. (Form No. H520.030, Nov. 1982).

rather than forcing her to review them, does not cure these infirmities. Plainly, a woman is likely to review materials recommended to her by her physician or counselor. If she is discouraged from doing so, that will only arouse suspicion and undermine the woman's confidence in her medical advisor. Once the woman chooses to review the materials, the physician or counselor must answer any questions she might have and deal with her reaction, diverting attention from the information relevant to that particular woman. This is a burden that Pennsylvania cannot impose under the guise of informed consent. *Women's Medical Center v. Roberts*, 530 F. Supp. 1136, 1154 (D.R.I. 1982).

The requirements of Section 3205(a) (2) (i) and (ii) that the woman be informed of the "facts" that medical assistance benefits may be available and that the father is liable to assist in the support of her child are also an impermissible attempt to discourage the woman from choosing abortion. Non-medical information of this type, which lies beyond the expertise of the physician or counselor, is, for many women, inappropriate. (J.A. 46a-47a). For a woman carrying a life threatening pregnancy, the availability of medical assistance benefits is not relevant, and a physician giving such information may destroy the physician-patient relationship. Similarly, a victim of rape should not have to hear that an unidentified perpetrator is liable to support her child if she carries the pregnancy to term.

Furthermore, the statute is framed in terms calculated more to confuse than to enlighten. The ultimate realization of the financial support promised by the disclosure is far from a certainty.¹⁸ A woman who elects to carry her preg-

18. A father is "liable" for the support of his child only after legal paternity is established, which may, if contested, take
(Continued on next page)

nancy to term because she expects to receive such support may be bitterly disappointed if the administrative or legal process fails her.

The coercive impact of the informational requirements in Section 3205(a) (1) is more subtle, but no less real. The requirement that the woman be informed of the particular medical risks associated with the abortion procedure does not permit the physician to refrain from informing the woman of minor or remote risks that confuse or traumatize her. (J.A. 43a). The compelled recitation of "the fact that there may be detrimental physical and psychological affects [to the abortion procedure] which are not accurately foreseeable," § 3205(1)(ii), only compounds the problem. Making this vague and indefinite statement to each and every patient will serve no purpose except to heighten the woman's anxiety about the abortion procedure and to discourage her from having that abortion. (J.A. 43a). Confusing information of this type represents the antithesis of informed consent.¹⁹

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several years. Even where a woman has obtained a court order of support, enforcement of that order is at best uncertain. Twenty-eight percent of women entitled to child support payments by court order receive no money at all, and those who do, receive an average of only \$2,100 per child. See *Child Support Enforcement Legislation, Hearing before the Subcomm. on Public Assistance and Unemployment Compensation of the House Ways and Means Committee*, 98th Cong., 1st Sess. (1983). Moreover, many poor pregnant women are not eligible for medical assistance benefits in Pennsylvania. A woman with one child, earning in excess of \$400 per month (47% of the federal poverty level) or a woman with a working spouse is totally excluded from coverage. See 62 Pa. Stat. Ann. § 441.1 (Purdon 1985); 55 Pa. Code §§ 171.21, 171.22.

19. Appellants argue that this component of the informational requirements must be found constitutional in light of this Court's summary affirmance in *Planned Parenthood Ass'n v.*

(Continued on next page)

These requirements are contrary to accepted medical practice and inconsistent with the law of informed consent as it has been adopted and interpreted in Pennsylvania.²⁰ Like the City of Akron, Pennsylvania "has gone far beyond merely describing the general subject matter relevant to informed consent." *Akron*, 462 U.S. at 445. Section 3205 of the Act "specifies a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision." *Id.* Thus, the same inflexibility that condemned the *Akron* ordinance is present in Sections 3205 and 3208.

Appellants argue that the physician or counselor is always free to give information beyond that specifically

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Fitzpatrick, 401 F.Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). That case held the informed consent provision in the 1974 Pennsylvania Abortion Control Act to be constitutional. 35 Pa. Stat. Ann. § 6603 (Purdon 1977). The provision did not contain plainly unconstitutional informational requirements such as those in the Act, nor did it contain physician-only counseling or 24-hour waiting period requirements. Moreover, since 1974, abortion has been one of the most studied medical procedures, and it is doubtful that, today, there are "unforeseen" risks of that procedure. See Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Family Planning Perspectives 26 (Jan./Feb. 1984). In any event, the summary affirmance in *Fitzpatrick* preceded this Court's plenary consideration of informed consent statutes in *Akron*, and, inasmuch as that summary affirmance is inconsistent with *Akron*, it must yield. *E.g., Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979).

20. Pennsylvania informed consent law recognizes that the disclosure of minor or remote risks is not required. See generally *Sauro v. Shea*, 257 Pa. Super. 87, 94, 390 A.2d 259, 263 (1978); *Jeffries v. McCague*, 242 Pa. Super. 76, 84-85, 363 A.2d 1167, 1171 (1976); *Cooper v. Roberts*, 220 Pa. Super. 260, 267, 286 A.2d 647, 650-51 (1971). This general standard of informed consent will apply to abortion procedures once § 3205 is stricken.

required in order to tailor the informed consent dialogue to a patient's individual situation. This argument ignores that a physician or counselor cannot possibly provide an adequate explanation of the "unforeseeable" consequences of abortion or undo the harm that may result when he or she provides confusing, irrelevant or psychologically damaging information.

Moreover, this argument fails to account for the enforcement provisions of Section 3205(c) and (d) that strongly encourage, if not compel, the physician or counselor to adhere to the Commonwealth's prescribed litany without deviation. Under subsection (c), a physician who violates the informed consent section is subject to the civil penalty of license suspension or revocation while the counselor who fails to comply is subject to criminal penalties. At the same time, a physician who complies with the informed consent provisions is relieved from civil liability to the patient for failure to give informed consent under subsection (d).

The only sure way to comply with the Act is to present information to the woman in a way that tracks the statutory language precisely, without elaboration, and to disclose every conceivable risk of the abortion procedure. The strong incentives for strict compliance will lead to a rote recitation of the statutory provisions, and women may not obtain additional or specifically tailored information needed to make the abortion decision. As a result, a statute whose ostensible purpose is to protect women's health may become the instrument by which that purpose is defeated.

Finally, appellants argue that this Court should sever any unconstitutional informational requirements and permit the remainder to become effective. Since most of the

requirements are objectionable, the radical surgery necessary to bring Sections 3205 and 3208 within constitutional bounds will result in a section bearing little resemblance to that intended by the Pennsylvania legislature. The reasons that supported this Court's rejection of a similar suggestion in *Akron* apply here. 462 U.S. at 445 n.37. Despite a severability clause as broad as that in the Act, 462 U.S. at 425 n.8, the Court declined to sever arguably unobjectionable informational requirements because the informed consent section contained the unconstitutional physician-only counseling requirement. Section 3205 not only has a physician-only counseling requirement, but also a mandatory 24-hour waiting period and specific informational requirements that skew the woman's decision. Thus Sections 3205 and 3208 must be enjoined in their entirety.

B. Section 3210(b)'s Choice Of Method And Standard Of Care Requirements Elevate Potential Life Over The Life And Health Of A Woman In Violation Of Her Fundamental Right To Privacy And Are Unconstitutionally Vague.

In 1984, over 59,000 abortions were performed in Pennsylvania. Approximately .1% of these (sixty-nine abortions) were performed after the twentieth week of pregnancy and only .008% (five abortions) were performed after the twenty-fourth week of pregnancy. Addendum at 40a.²¹ These statistics do not indicate whether the fetus was viable at the time these abortions were per-

21. National statistics are in accord. Since 1975, only 1% or fewer of all abortions have been at or after twenty-one weeks gestation and only .01% after twenty-four weeks. See Henshaw, *A Portrait of American Women Who Obtain Abortions*, 17 *Family Planning Perspectives* 90 (Mar./Apr. 1985).

formed; nevertheless, they establish that post-viability abortions occurred rarely in Pennsylvania in 1984.²²

Post-viability abortions are performed for grave and substantial medical reasons. Women suffering from heart disease, kidney disease, eclampsia, cancer or diabetes may require an abortion after the fetus is viable. In addition, a late term abortion may be indicated if the woman discovers through amniocentesis that she is carrying a fetus with severe genetic disorders, such as conjoined twins, thanatophoric dwarfism or anencephalia (lack of brain). Section 3210(a) of the Act prohibits an abortion after the fetus is viable unless necessary to preserve the life or health of the pregnant woman. Consequently, the requirements of Section 3210(b) will come into play only where a physician has determined that the patient's life or health is threatened absent an abortion.

Section 3210(b) of the Act provides two independent requirements for post-viability abortions. First, it compels the exercise of the standard of care that would be required in order to preserve the life and health of any "unborn child" intended to be born and not aborted. Second, the physician must use the abortion method providing the

22. *Roe* placed the point of viability generally at twenty-eight weeks gestation but said it may occur as early as twenty-four weeks. 410 U.S. at 160. Since 1973, medical evidence shows that survival rates for fetuses born at twenty-four weeks have improved. Contrary to the unverifiable evidence offered by some amici, medical literature does not support a finding that the point of viability has moved any earlier than twenty-four weeks. Gilstrap, *Survival and Short-Term Morbidity of the Premature Neonate*, 65 *Obstetrics And Gynecology* 37 (Jan. 1985); Koops, *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 *J. Pediatrics* 969 (Dec. 1982); Walker, *Cost-Benefit Analysis of Neonatal Intensive Care for Infants Weighing Less Than 1,000 Grams at Birth*, 74 *Pediatrics* 20 (July 1984).

best opportunity for the fetus to be "aborted alive" unless that method would present a "significantly greater" medical risk to the life or health of the pregnant woman.²³ Any person failing to comply with either requirement commits a felony of the third degree, which carries a maximum penalty of seven years imprisonment and a fine of \$15,000. 18 PA. CONS. STAT. ANN. §§ 1101(2), 1103(3) (Purdon 1983).

Because the choice of method and standard of care prescriptions violate a woman's fundamental right to privacy, and are unconstitutionally vague, the court of appeals' decision that Section 3210(b) is unconstitutional must be affirmed.

1. **The choice of method requirement violates the woman's fundamental right to privacy because it fails to make maternal health the physician's paramount consideration.**

By compelling the use of the abortion method most likely to result in the fetus being "aborted alive," unless that procedure would result in a "significantly greater" risk to the woman, Section 3210(b) would plainly require in some instances that the physician use a method which

23. In assessing the medical risk to the pregnant woman, the physician is prohibited from considering the potential psychological or emotional impact of the unborn child's survival. The availability of amniocentesis to detect in utero fatal genetic diseases, such as Tay-Sachs, has permitted women that are at risk of bearing children with such diseases to become pregnant, knowing that they can obtain an abortion if amniocentesis shows that the fetus suffers the disease. Because the results from amniocentesis are not available until late in the second trimester of pregnancy, the limitation of § 3210(b) on the physician's ability to consider this aspect of the woman's health may preclude such abortions, thereby forcing women in these circumstances to avoid pregnancy altogether.

is riskier for the woman because it provides a greater chance for fetal survival. Applying the principles of *Roe*, 410 U.S. at 164-65, and *Colautti v. Franklin*, 439 U.S. 379 (1979) ("*Colautti*"), the court of appeals found this section unconstitutional because it impermissibly requires the doctor to "make a trade-off between the woman's health and additional percentage points of fetal survival" and fails to require that maternal health be the physician's paramount consideration. 737 F.2d at 300.

Appellants concede that a state cannot constitutionally compel this trade off; nor do they seriously contend that the term "significantly greater," if given its usual and customary meaning, might prevent the physician from choosing that method of abortion which best serves the medical interests of the woman. Rather, appellants argue that the term "significantly greater" really means a "meaningfully increased" risk, thus eliminating that phrase from the Act. Brief for Appellants at 85. As the court of appeals found, such a construction is "inconsistent with the statutory language and legislative intent reflected in that language." 737 F.2d at 300. Indeed, that construction would also conflict with Pennsylvania's own rules of statutory construction.²⁴ Therefore, it must be rejected, and Pennsylvania's unconstitutional attempt to elevate potential life over the life and health of women must fall.

24. Those rules require that words and phrases be construed "according to rules of grammar and according to their common and approved usage," and to construe "general words to take their meaning and be restricted by preceding particular words." 1 Pa. Cons. Stat. Ann. § 1903 (Purdon 1985). Pennsylvania law also requires that "every statute shall be construed to give effect to all its provisions." 1 Pa. Cons. Stat. Ann. § 1921 (Purdon 1985).

2. The choice of abortion method prescription is also void for vagueness.

As a matter of due process, a criminal statute is void for vagueness when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617 (1954), or is so indefinite that it "encourages arbitrary and erratic arrests and convictions," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). See generally *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The vagueness doctrine applies with especial force where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Colautti*, 439 U.S. at 394; *Grayned v. City of Rockford*, 408 U.S. at 104; *Smith v. Goguen*, 415 U.S. 566 (1974). A statute that "does not afford broad discretion to the physician" but instead, "conditions potential criminal liability on confusing and ambiguous criteria . . . presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Colautti*, 439 U.S. at 394. The choice of method requirement in Section 3210(b) poses these serious problems and is therefore void for vagueness.

A physician attempting to adhere to this requirement faces potential criminal liability conditioned on a series of uncertain judgment calls: The physician must first determine that the fetus is viable; then the physician must choose the abortion method that will provide the best opportunity for the fetus to be "aborted alive" and determine whether this procedure will present a "significantly greater" risk to the woman's health than would another method.

The vagueness in the choice of method requirement is apparent when applied to specific conditions that may compel a late term abortion. For example, a diabetic woman at twenty-eight weeks of pregnancy may need an abortion because she is in imminent risk of blindness; or a woman may discover at twenty-six weeks of pregnancy that the fetus is anencephalic. In these circumstances, is the fetus viable? This determination is at best imprecise even when no complications exist, as this Court has recognized. *Roe*, 410 U.S. at 160; *Danforth*, 428 U.S. at 64; see also *Colautti*, 439 U.S. at 388.²⁵ But here, the difficulty of the viability determination is compounded by the very conditions that may necessitate the abortion. The woman's underlying diabetes may have slowed or advanced the growth of the fetus. There is serious debate in the medical profession whether an anencephalic fetus can ever be found viable because sustained survival is impossible.

Which abortion method is more likely to produce a fetus that will be aborted alive without a significantly greater risk to the woman's health? This too is a difficult decision, far from the simple "everyday task" that appellants maintain is the case. Brief for Appellants at 87-88. The physician can choose one of eight abortion methods.²⁶

25. Even today, where the use of ultrasonography has substantially improved medical practice in this area, doctors can misjudge the weight, length, or gestational age of a fetus by as much as 11 days, Grimes, *Second-Trimester Abortions in the United States*, 16 Family Planning Perspectives 260, 264 (Nov./Dec. 1984), and physicians utilize different standards for determining viability. *Colautti*, 439 U.S. at 396 n.15.

26. These methods are hysterectomy, hysterotomy, oxytocin, instillation of urea, prostaglandin, a combination of urea-prostaglandin or hypertonic saline and dilatation and evacuation ("D&E"). Today, physicians may combine instillation tech-

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Although a physician may know the general risks of a procedure, the patient's underlying medical condition and the manner in which the procedure is performed will cause the specific risks to vary from patient to patient; and because relative risks are just that, the outcome for each woman can never be predicted accurately.

Even a determination based on general risk factors is uncertain. Most physicians would agree that three of these methods (hysterectomy, hysterotomy or oxytocin) would rarely be used given the significantly increased risks to the woman. There would, however, be disagreement over the preferred method of abortion among the remaining techniques.²⁷ Perhaps the only certainty is that some doctors would find that the methods apparently required by the statute (urea or prostaglandin instillation) are not the methods most likely to be chosen if the doctor were free to exercise his best medical judgment (D&E or a combined urea-prostaglandin instillation).²⁸

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niques with instrumental evacuation of the uterus and call the entire procedure a D&E. Urea, prostaglandin and saline abortions are used less and less because some physicians consider these methods to be more dangerous to the woman than the D&E method or the combined urea-prostaglandin instillation. The hysterectomy and hysterotomy are today almost never used because current research has shown these procedures to be almost 100 times more dangerous to the pregnant woman than any other method of abortion. See Grimes, *supra* n.25.

27. There are contraindications for each of the instillation methods. For example, contraindications for the use of saline include: sickle-cell anemia, cardiac insufficiency, renal disease and hypertension. Kerengy, *Hypertonic Saline, Instillation Second-Trimester Abortion* 79, 83 (Berger ed. 1981). Contraindications for prostaglandin abortions include asthma, pulmonary hypertension, glaucoma, epilepsy or hypertensive disease. Hern, *Abortion Practice* 125 (1984).

28. For highly skilled physicians, D&E is clearly the preferred method for it is quicker than the other methods, reduces the

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To confuse matters further, the Act contains no definition of "aborted alive" and the definition of "born alive", contained in Section 3203 of the Act is different from the medical definition.²⁹ Like the assessment of viability, the prediction of whether the fetus will be "aborted alive" is always uncertain and can vary depending upon the condition of the fetus and the manner in which the abortion is performed.³⁰ Since late term abortion techniques have changed considerably within the last few years and no reliable data exist on late term abortion methods or the frequency of live births³¹ the relative risks of producing a live born fetus are indeterminable.

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woman's susceptibility to infection and does not require her to experience labor. For other physicians, urea-prostaglandin is the method of choice because it is faster than use of urea or prostaglandin alone, and thus decreases the risk of insulin shock or diabetic acidosis, which can lead to coma or death.

29. The medical definition of "live born infant" is:

A fetus, irrespective of its gestational age, that after complete expulsion or extraction from the mother shows evidence of life—that is, heartbeats or respirations. *Heartbeats are to be distinguished from several transient cardiac contractions; respirations are to be distinguished from fleeting respiratory efforts or gasps.* . . .

American College of Obstetricians and Gynecologists, Committee on Terminology, *Obstetric-Gynecologic Terminology* 454 (Hughes ed. 1972) (emphasis added).

30. For example, some physicians will never consider an anencephalic fetus viable at 26 weeks, although they might determine that the same fetus could be "born alive" as defined in § 3203. Other physicians could consider this fetus viable, but not likely to be "aborted alive" except by use of hysterotomy or hysterectomy, which carry a much higher risk to the woman.

31. Neither the National Center for Health Statistics nor the Centers for Disease Control collect statistics on the frequency of live births following abortions. Research shows, however, that the probability of live birth has most likely declined in the past decade because women are obtaining abortions at progressively earlier gestational ages, the use of ultrasonography to con-

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In the face of such uncertainty and the potential for criminal liability, the statute as drafted will chill physicians from performing necessary abortions late in pregnancy. For the brave few who will continue to perform these procedures, the statute will encourage physicians to minimize women's health problems and to choose the method most likely to produce live birth, because this choice avoids liability under the statute.³²

The Commonwealth cannot use the coercive power of criminal liability to force physicians to choose an abortion method that may increase the threat to the patient's life or health, particularly not in the vague terms employed in Section 3210(b). "[W]here conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Colautti*, 439 U.S. at 400-01. Moreover, the decision whether a woman is willing to subject herself to an increased chance of certain disabling conditions, or even death, in order to increase the likelihood of a live birth is a question better answered

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firm gestational age has become more widespread, and the use of hysterotomy, hysterectomy, urea and prostaglandin instillation techniques, which are more likely to produce a live birth have declined because they are more hazardous to women's health. See Grimes, *supra* n.25.

32. To confuse things further, it is never entirely clear whether the chosen procedure constitutes an abortion as defined by § 3203 of the Act, a definition inconsistent with the accepted medical definition of abortion. See Williams *Obstetrics* 447 (17th ed. 1985). The definition of abortion in the Act turns on the doctor's intent and the means used to complete the medical procedure. Ironically, a physician performing a hysterotomy or induction by oxytocin with intent to produce a live born fetus, may not be performing an abortion, while a physician performing a Caesarian section on a weak, full-term fetus, with knowledge that the fetus may not survive the delivery, could be performing an abortion.

in the context of the physician-patient relationship, in light of all factors relevant to that woman, most especially her health.

3. The standard of care prescription fails to contain an exception for the woman's life or health and fails to specify that the physician's subjective judgment is controlling.

Section 3210(b) also requires the physician to exercise the standard of care for post-viability abortions that would apply in order to preserve the life and health of any "unborn child" intended to be born. The standard of care language suffers the same vagueness problems as the statute at issue in *Colautti* and is therefore unconstitutional.

Neither Section 3210(b) nor the other provisions of the Act specify particular actions that a physician must take in order to meet the standard of care and, for that reason alone, the provision may be unconstitutionally vague. At a minimum, current medical literature indicates that some physicians might read this section as requiring them to administer steroids to improve respiratory function of the fetus, see Bishop, *Acceleration of Fetal Pulmonary Maturity*, 58 OBSTETRICS AND GYNECOLOGY 48s (Supp. Nov. 1981), or to insert a shunt into a hydrocephalic fetus to enhance the likelihood of survival. See Clewell, *A Surgical Approach to the Treatment of Fetal Hydrocephalus*, 306 N. ENG. J. MED. 1320 (June 1982). The statute may also require a physician to delay the termination of a pregnancy longer than would be warranted if the health of the woman were the only concern.

The standard of care requirement does not contain an exception that would allow physicians to forego extra-

ordinary efforts on behalf of the fetus where those efforts might jeopardize the woman's health or life. Particularly where the medical practice is contraindicated because of the presence of complications,³³ the lack of a maternal life or health exception could require physicians to violate their paramount duty to their patients. As in *Colautti*:

The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus; they are mentioned only in the second part which deals with the choice of abortion procedures.

Colautti, 439 U.S. at 400.

Moreover, it is unclear whether the prescribed standard of care imports a clearly subjective standard or whether it imposes a mixed subjective and objective standard. As the Court found in *Colautti*:

The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center.

439 U.S. at 391-92. Accordingly, Section 3210(b) does not meet constitutional standards, and the court of appeals' decision must be affirmed.

C. The Requirement That A Second Physician Be Present At A Post-Viability Abortion Is Unconstitutional Because It Lacks A Clear Exception For Medical Emergencies.

33. For example, administration of steroids is contraindicated where there is a need for immediate delivery, or in cases of maternal infection, maternal diabetes or maternal hypertension. *Acceleration of Fetal Pulmonary Maturity*, *supra* p. 33 at 505.

Section 3210(c) of the Act requires the attendance of a second physician for post-viability abortions unless there is no possibility of fetal survival. In *Ashcroft*, six justices of this Court concluded that a similar second-doctor requirement could not withstand constitutional scrutiny absent an exception for medical emergencies in which waiting for a second physician may endanger the woman's health. 462 U.S. at 485 n.8 (opinion of Powell, J.), 501-03 opinion of Blackmun, J.). Since post-viability abortions are performed when the woman is suffering from grave medical conditions, the need for emergency medical care is not only foreseeable, but likely. The absence of this exception is therefore more than a minor flaw in the drafting of the statute.

Appellants concede that a medical emergency exception to Section 3210(c) is constitutionally mandated, but they contend that such an exception exists in Section 3210(a) which provides in pertinent part:

It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment . . . that the abortion was necessary to preserve maternal life or health.

The court of appeals correctly concluded that this language only protects the physician against a charge that the post-viability abortion was unlawful and does not provide a medical emergency exception to the second-doctor requirement, found in a separate subsection.

Moreover, reading this language to provide a medical emergency exception cannot be squared with the remainder of the Act, which, in five separate provisions, contains express exceptions for a medical emergency, as narrowly de-

fined in Section 3203.³⁴ Obviously, the Pennsylvania General Assembly knew how to provide for a medical emergency exception, and its failure to do so in Section 3210(c) must have been intentional. Therefore, the court of appeals' holding that this section does not meet constitutional standards must be affirmed.

D. The Reporting Requirements Enjoined By The Court Of Appeals Exceed Constitutional Limitations As Defined In Danforth.

Since 1974, Pennsylvania has been gathering aggregate statistical information each calendar quarter from abortion facilities. 35 PA. STAT. ANN. § 6606(e) (Purdon 1977) (repealed); 18 PA. CONS. STAT. ANN. § 3214(f) (Purdon 1983). Each year, the Department of Health combines this statistical information into a single report made available to the public. *See, e.g.*, Addendum at 37a-42a.

The forms used for these reports identify each facility making the report. However, as the district court found in June of this year:

[I]t was the policy of the Department of Health of the Commonwealth of Pennsylvania to separate abortion records submitted by each facility licensed in the Commonwealth from the coversheet which identified the facility. This policy was "to avoid the possibility that certain facilities and physicians could be pressured and possibly harassed by members of the public objecting to the medical abortion practice." Plaintiffs' Exhibit 7. It was the position of the Department of Health "that patient care may suffer if physicians or abortions [sic] clinics are under harassment . . ."

Id.

34. A medical emergency exception is expressly provided in: the private medical consultation requirement (§ 3204), the informed consent requirements (§ 3205), the parental-judicial consent requirements (§ 3206), the post-first trimester hospitalization requirement (§ 3209) and the requirement that no public official issue any order requiring an abortion without the express voluntary consent of the woman (§ 3215(f)).

Addendum at 3a-4a.³⁵

In a dramatic departure from prior Pennsylvania law, numerous provisions of the Act require physicians, hospitals or clinics to furnish at least six separate reports to the Commonwealth providing an extraordinary amount of detailed information. All but two of these reports must be made available for public inspection and copying. §§ 3207(b), 3214(a),(e)(2),(f),(h).³⁶ For example, Section

35. This policy of gathering significant health statistics while at the same time preserving necessary confidentiality is entirely consistent with the practice of federal agencies that collect similar information. The National Center for Health Statistics has concluded:

The Report of Induced Termination of Pregnancy is designed to collect information for statistical and research purposes only. These reports are not maintained permanently in the official files of the State health department. The data that are gathered from these reports will be presented in aggregate rather than individual form.

Hospitals, clinics, and physicians are assured that extensive legal and administrative measures are used to protect individuals from unauthorized disclosure of personal information contained on the reporting form.

National Center for Health Statistics, *Handbook on the Reporting of Induced Termination of Pregnancy*, DHEW Publication No. (PHS) 79-1117 at 4 (1979).

36. The individual maternal death report, enjoined by the court of appeals, is not subject to public disclosure, although a statistical report drawn from the individual reports is to be made publicly available. § 3214(g). This report is nevertheless objectionable because it requires physicians to report maternal deaths in a manner inconsistent with accepted medical standards, the purpose being only to inflate the number of deaths due to abortion so as to discourage the abortion choice. For example, maternal death following an abortion that was not completed due to an ectopic pregnancy is to be included as an incident of maternal death arising from induced abortion even though the actual cause of death was the ectopic pregnancy. The only other report not available to the public is the pathological report in § 3214(c), (d) that was not enjoined below.

3214(a) requires that an individual report be filed for each abortion setting forth 14 categories of information including the physician's or clinic's name, the woman's age, race, marital status, residence and prior pregnancies, "the length and weight of the aborted unborn child when measurable" and the method of payment for the abortion.

The court of appeals enjoined the collection of the individual abortion report as well as the individual complication report, § 3214(h), the report of maternal death, § 3214(g), and the report on the determination of viability, § 3211(a).³⁷ It did not, however, enjoin the sections requiring facility identification reports, § 3207(b), quarterly statistical reports, § 3214(f), or reports of pathological examinations, § 3214(e),(d).

After remand to the district court, appellees sought a preliminary injunction against the requirement that the facility identification report and the quarterly statistical report be made available for public inspection and copying. On June 17, 1985, after a full evidentiary hearing, the district court entered an order, with extensive findings of fact and conclusions of law, preliminarily enjoining the enforcement of these public disclosure requirements. Addendum at 1a-37a.

The record showed a broad-based, intensive and continuous pattern of violence and harassment directed

37. Contrary to appellants' contention, appellees raised the issue of the constitutionality of the physician's report on viability required by § 3211(a) before the court of appeals. Section 3214(a) (8) provides that "the information required to be reported under § 3211(a) (relating to viability)" is to be included in the individual abortion report. Appellees' general challenge to the individual abortion report necessarily subsumes a challenge to the specific pieces of information to be included in that report.

against the patients and staff members of abortion clinics. Addendum at 5a-15a. The district court concluded that this pattern of violence and harassment would be increased by the public disclosure of facility names and quarterly statistical reports. In addition, public disclosure would impose a burden on a woman's right to choose an abortion by heightening her fear and anxiety and by discouraging physicians from offering abortions to avoid pressure from anti-abortion forces. In light of these recent findings of the district court in this case, and this Court's decisions in *Danforth* and *Akron*, the decision of the court of appeals enjoining these reporting requirements must be affirmed.

The statute in *Danforth* required facilities to maintain forms promulgated by state health officials "the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data." 428 U.S. at 87. The information and reports were to be used "only for statistical purposes." *Id.* On the strength of the district court's conclusion that these record keeping requirements were "essential to the advancement of medical knowledge," the Court found that, "while perhaps approaching impermissible limits," the requirements were constitutional. Central to this conclusion was the statutory requirement that the records be maintained in confidence, with the sole exception of public health officers. *Id.* at 80-81.

In *Akron*, the Court explained its holding in *Danforth*:

In *Danforth*, *supra*, we unanimously upheld two Missouri statutory provisions, applicable to the first trimester, requiring the woman to provide her informed written consent to the abortion and the physician to keep certain records, even though comparable require-

ments were not imposed on most other medical procedures. See 428 U.S., at 65-67, 79-81. The decisive factor was that *the State met its burden of demonstrating that these regulations furthered important health-related state concerns*. But even these minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth. See *id.*, at 81.

462 U.S. at 430 (emphasis added).

The elements that were essential to the holding in *Danforth* are not present here. There is no evidence of "important health-related concerns" furthered by the reports at issue; appellants have asserted nothing more than a general interest in maternal health to justify these onerous reporting requirements.³⁸ The mere assertion of that interest, however, is not sufficient to support reporting requirements like these, that have a significant impact on the abortion decision, that radically depart from accepted health reporting standards,³⁹ and that go far

38. Indeed, when forced to justify the extraordinary burden of public disclosure before the district court, appellants offered the novel, and wholly unfounded, argument that such disclosure would enhance and facilitate the exercise of First Amendment rights of opponents of abortion. The district court resoundingly rejected this proffered justification. Addendum at 30a-32a.

39. Appellants contend that the information required in the individual abortion reports is similar to that compiled by the Centers for Disease Control. However, a comparison of § 3214 (a) with the information reported by the CDC in its surveillance reports reveals that only seven of the fourteen categories in the statute are reported by the CDC. In any event, the CDC gathers this data in aggregated form, primarily from central health

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beyond those found acceptable in *Danforth*.⁴⁰

Moreover, the reporting scheme here poses a far more serious threat to the abortion right than the record keeping requirement in *Danforth*. The required reports are extremely detailed and must be filed with the Commonwealth for each abortion, or each occurrence of complications or maternal death. Unlike reports made to any other state or federal health agency, the reports themselves are not confidential, and there is absolutely no limitation on the use to which the Commonwealth or the members of the public who obtain these reports can put them.

The combination of individual, detailed reports and mandated public disclosure of those reports renders the enjoined reporting requirements particularly sinister. The decision to terminate a pregnancy is a highly personal and intensely private one that must be protected from interference. Such protection compels absolute anonymity for the woman who elects an abortion, as this Court recognizes by permitting women who challenge abortion statutes to proceed by use of pseudonym. *E.g., Roe v. Bolton*, 410 U.S. 179 (1973). As Justice Stevens so cogently remarked in *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) ("*Bellotti II*"):

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agencies of each state, and it does not receive individual abortion reports. See Centers for Disease Control: *Abortion Surveillance 1979-1980* at 2 (1983).

40. The record before the court of appeals established that the reporting requirements in the Pennsylvania Act will increase the cost of abortion to an unspecified extent. Appellants argue that this cost will surely be less than the cost of the pathological examinations sustained in *Ashcroft*. This argument misses the mark. When statutorily imposed requirements increase the cost of abortions, the extent of the increase must be balanced against the specific health benefits that flow from the increase. *Ashcroft*, 462 U.S. at 488-90 (opinion of Powell, J.) Appellants have established no such specific benefits to

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It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.

Compelled disclosure can unconstitutionally chill the exercise of fundamental rights, particularly when the disclosed activity is unpopular or controversial. *E.g.*, *Brown v. Socialists Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 449 (1958).

Given the recent history of violence directed against abortion providers and women seeking abortions, many physicians will be reluctant to provide this medical service unless they can protect their identity from public disclosure. Moreover, a woman will necessarily be more afraid to choose an abortion if there exists any possibility that her choice would become publicly known. Yet this is precisely the possibility that would result from the compelled submission and public disclosure of the detailed reports required by the Act.⁴¹

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justify any increased cost that reporting requirements would impose.

41. While the statute does not require the reporting of the woman's name, the amount of information about the woman and the circumstances under which she had an abortion in the report is so great that the possibility of identification by piecing together the information is far from remote. Publication of the fact that a 32-year old, married, Asian woman, residing in a particular small town, who had three prior pregnancies, obtained an abortion on a given date at a particular facility could be tantamount to publishing that woman's name. Vigilant opponents of abortion could combine this data with other readily available information, such as census data. Moreover, while the physician's name is to be deleted from the public copy of the report, the name of the facility is not, and as defined by the Act facility includes individual physicians' offices. Every physician who performs early abortions in his office will be exposed just as surely as if his name were not deleted. This is the type of provider most likely to withdraw from abortion practice if subject to violence or harassment. Addendum at 25a-28a.

The burdens that would be imposed are severe. They not only increase the cost of an abortion but also threaten the exercise of a woman's fundamental right to choose an abortion, and they can lay claim to no firm justification in public health. The court of appeals properly enjoined these reporting requirements. Its decision should be affirmed.

E. The Promulgation Of Rules Governing Judicial Authorization Proceedings Has Rendered The Court Of Appeals' Decision Moot; The Question Of The Validity Of The New Rules Should Be Addressed First By The District Court.

Section 3206 of the Act requires a physician to obtain parental consent or judicial authorization prior to the performance of an abortion on any woman under the age of 18 or any incompetent woman. Although requested to do so, the court of appeals did not invalidate the parental-judicial consent provisions of the Act,⁴² finding that the statute met the constitutional standards set forth in *Akron*, 462 U.S. at 439-42, and *Ashcroft*, 462 U.S. at 490-93. The court held, however, that because

the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form . . . [the operation of Section 3206] is enjoined until the state promulgates regulations, without prejudice to the right of these or other plaintiffs to attempt to demonstrate in this action, if still pending, or in some future action, that the regulations are unconstitutional.

42. This portion of the court of appeals' decision is not before this Court. Appellees reserve their right to present additional evidence in support of their position after remand to the district court.

737 F.2d at 297; see *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1008-09 (1st Cir. 1981).

In November, 1984, after this appeal was docketed, the Pennsylvania Supreme Court promulgated rules for judicial authorization proceedings under Section 3206. Pennsylvania Orphan's Court Rule 16, 14 Pa. Bull. 4503 (Dec. 15, 1984). Because the absence of rules was the underlying basis for the court of appeals' injunction, their promulgation has rendered the appeal moot. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). Since "the exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy," and the "controversy must be extant at all stages of review, not merely at the time the complaint is filed," *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)), this Court should dismiss this portion of the appeal and remand the matter for further proceedings. See also *Roe*, 410 U.S. at 125.

The constitutionality of the rules as promulgated must be determined before the Commonwealth can enforce the provisions of Section 3206. Initial consideration of this matter should be made by the district court, rather than this Court, since the parties have had no opportunity to develop a factual record, and this Court does not have the benefit of lower court assessment of the issues. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 52-53 (1980); *Fusari v. Steinberg*, 419 U.S. 379, 386-90 (1975); *Differderfer v. Central Baptist Church, Inc.*, 404 U.S. 412, 415 (1972).

F. The Rules Promulgated By The Pennsylvania Supreme Court Do Not Provide For A Constitutional Judicial Authorization Procedure.

If the Court does consider the constitutionality of the rules that implement Section 3206, then they must be en-

joined since they are facially unconstitutional. In Pennsylvania last year, over 7,000 minor women obtained abortions. The vast majority of these women, 89.9%, were older teenagers aged fifteen to seventeen, capable of making their own decisions regarding abortions. Addendum at 39a. Moreover, parents are involved in their daughter's abortion decision in most cases, especially when the minor is age 14 or below.⁴³

Although in a perfect world, all parents and their teenage daughters would communicate with each other about decisions as important as abortion, this is not always possible. Indeed, parental involvement in the abortion decision may in some cases cause tensions and emotional strain and create long-term problems in inter-family relationships. (R., Stipulation of Uncontested Facts, ¶¶ 145, 146). Parents who are told of the pregnancy may become upset and abusive, and may attempt to influence their daughter to carry the pregnancy to term, without regard to her best interests. (*Id.*, ¶¶ 149, 150). In some cases, minors may be rejected, lose financial support or be disowned if there is parental involvement. (*Id.*, ¶ 150). See also *Donavan*, *supra* n.43, at 262.

Recognizing the risks of forced parental involvement in the abortion decision, this Court has required that states provide an independent judicial alternative "whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, de-

43. See *Donavan*, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 *Family Planning Perspectives* 259, 261 (Nov./Dec. 1983); *Torres*, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 *Family Planning Perspectives* 284, 287 (Nov./Dec. 1980).

spite her immaturity, an abortion would be in her best interests." *Akron*, 462 U.S. at 439-40; *Ashcroft*, 462 U.S. at 491; *Bellotti II*, 443 U.S. at 643-44. This judicial proceeding must assure that resolution of the issue, and any appeals that follow, will be completed with anonymity and sufficient expedition, and must provide the minor with an effective opportunity for an abortion to be obtained. *Bellotti II*, 443 U.S. at 644. The newly promulgated rules fail to meet these requirements.

Unlike the statute in *Ashcroft*,⁴⁴ Pennsylvania Orphan's Court Rule 16.4 gives the applicant's "parents or persons standing in loco parentis" an absolute right to attend the hearing, even if parental involvement is contrary to the minor's best interests. This unavoidable parental participation is plainly unconstitutional. A mature minor "is entitled to make her abortion decision *independently*," *Bellotti II*, 443 U.S. at 630 (emphasis added), and a minor for whom an abortion is in her best interest "is entitled to court authorization *without any parental involvement*." *Id.* at 648 (emphasis added); see also *Akron*, 462 U.S. at 441 n.31.⁴⁵

The rules allow up to twenty-three days (seventeen business days) within which to complete any appeal from a denial of a minor's application. This three-week period is excessive in light of the critical need for expedition to satisfy constitutional standards, *Ashcroft*, 462 U.S. at 491

44. Mo. Ann. Stat. § 188.028 (Vernon).

45. Neither § 3206 nor the rules require parental notification that a petition has been filed. Nevertheless, parents may learn of their daughter's decision to petition the court, particularly when the minor has already sought her parents' consent for an abortion, but that consent has been withheld.

n.16; *Bellotti II*, 443 U.S. at 644, and to protect the best medical interests of minors seeking abortions.⁴⁶

Rule 16.3 requires that the court provide counsel to a minor upon her request. If the minor fails to request counsel, the court is not required to assess her maturity to make that decision or to appoint counsel when it is in the minor's best interests.⁴⁷ In *Ashcroft*, this Court emphasized that the judicial authorization procedure must provide a minor with "an effective opportunity for an abortion to be obtained." 462 U.S. at 491 n.16 (citation omitted). Given the "unique nature of the abortion decision," *Bellotti II*, 443 U.S. at 642, and the fact that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible," *id.*, a procedure that fails to provide for the appointment of counsel when in a minor's best interests falls short of constitutional standards. See *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127 (7th Cir. 1983); *Wynn v. Carey*, 582 F.2d 1375, 1389 n.28 (7th Cir. 1978).

46. Each week of delay in performing an abortion increases the complication rate by 15 to 30% and the death rate by 50%. Delay is particularly acute for minors, who are more likely than older women to seek abortion at later weeks of gestation, when the safest and least expensive methods of abortion can no longer be utilized. (R., Stipulation of Uncontested Facts ¶¶ 89, 157, 168-81); see also Grimes, *supra* n.25.

47. By contrast, the statute in *Ashcroft* contained an explicit provision mandating appointment of counsel in all cases where the minor does not have private counsel. Mo. Ann. Stat. § 188.028 2(3) (Vernon).

Rule 16.3 also accords too much discretion in the appointment of a guardian ad litem.⁴⁸ In representing an incompetent or minor's best interests, a guardian ad litem is empowered to substitute his or her judgment for that of the minor. In those limited instances where a minor is immature and unable to articulate why an abortion is in her best interest, the appointment of a guardian ad litem may be appropriate. However, in cases that involve a mature minor, the appointment of a guardian ad litem conflicts with the constitutional right of the minor to decide for herself whether to have the abortion. Thus, appointment of a guardian ad litem without carefully circumscribed duties threatens the possibility of a third party exercising an arbitrary veto over the minor's decision, contrary to *Danforth*, 428 U.S. at 74.

Given these constitutional infirmities in the rules, the decision of the court of appeals to enjoin Section 3206 until their promulgation and review by the district court was well justified.

48. By contrast, the statute in *Ashcroft* specified when a guardian ad litem should be appointed and the role of the guardian ad litem:

In any case where there exists the potential or appearances of conflict of interests between the parents or guardian or next friend of the child and the child, the court shall appoint a guardian ad litem to defend the minor's interests. The court shall set forth, for the record, the grounds for such appointment.

Mo. Ann. Stat. § 188.028 2(2) (Vernon).

CONCLUSION

This Court should dismiss the appeal for want of finality, consider the appeal papers as a petition for writ of certiorari and deny that petition. Alternatively, if the Court does not dismiss the appeal, the decision of the United States Court of Appeals for the Third Circuit from which the appeal is taken should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 82-4336

AMERICAN COLLEGE OF OBSTETRICIANS
AND GYNECOLOGISTS, PENNSYLVANIA
SECTION, et al.

v.

RICHARD THORNBURGH, et al.

FINDINGS OF FACT, DISCUSSION,
CONCLUSIONS OF LAW, AND ORDER

HUYETT, J.

June 17, 1985

Presently pending before me is the issue of whether or not to enjoin the Commonwealth of Pennsylvania from enforcing the public disclosure requirements of sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act. In order to place the present issues in context, it is first necessary to review the history of this case, a case which has evolved into a procedural morass.

The Pennsylvania Abortion Control Act was enacted on June 11, 1982 and was scheduled to become effective 180 days thereafter. In October, 1982, plaintiffs filed their complaint and on October 29, 1982, they filed a motion for preliminary injunction. After a hearing on December 2, 1982 and after considering the parties' extensive stipulation of facts, their proposed findings of facts and conclusions of law and memoranda of law, I issued an order on December 7, 1982 granting a preliminary injunction as to § 3205 of the Act and denying plaintiffs' motion for a preliminary injunction as to the remainder of the Act.

Plaintiffs immediately filed a notice of appeal and the Commonwealth cross-appealed as to the twenty-four hour waiting period of section 3205. On December 9, 1982, the Third Circuit granted plaintiffs' request for a stay of enforcement of the Act pending the appeal. After briefing and oral argument, the Third Circuit ordered the case held pending Supreme Court decisions in three then-pending abortion cases. After the Supreme Court decisions were issued, the Third Circuit requested additional briefing, heard reargument, and on May 31, 1984 filed its opinion.

Defendants thereafter filed an appeal to the Supreme Court pursuant to 28 U.S. § 1254(2), challenging the Third Circuit's holding certain sections of the Act unconstitutional. The Supreme Court has recently stated that it will hear oral arguments in this case next term although the Court did not note jurisdiction. 53 U.S.L.W. 3739 (1985).

In the meantime, defendants filed a motion on July 20, 1984 to stay proceedings in this court pending the outcome of the appeal before the Supreme Court. Plaintiffs stated that they would not object to the stay of proceedings if the reports required by sections 3207(b) and 3214(f) were maintained confidentially, i.e. if the enforcement of the disclosure provisions of §§ 3207(b) and 3214(f) were enjoined. By order dated September 13, 1984, I granted defendants' motion for a stay with the proviso that any reports filed pursuant to sections 3207(b) and 3214(f) would be maintained in confidence by the Commonwealth and would not be made available for public inspection pending an early hearing on these matters. On February 7, 1985, a hearing was held at which plaintiffs presented the testimony of several witnesses and docu-

mentary evidence; the defendants introduced several documents. After the hearing I requested additional briefing on several issues and then held oral argument on April 11, 1985.

The following constitute my findings of fact, discussion, and conclusions of law for purposes of a preliminary injunction.

FINDINGS OF FACT

1. The total number of abortions performed in Pennsylvania from January 1 to December 31, 1983 and reported to the Pennsylvania Department of Health was 59,288.

2. Of the 59,288, 70.3 percent (41,656) were performed in free-standing clinics; 25.6 percent (15,176) were performed in hospitals, and 4.1 percent (2,456) were performed in doctors' offices.

3. In a letter dated March 12, 1979 and addressed to Senator Henry Messinger, Dr. Frank Weaver, D.O.F.A. C.O.O.G., stated that he felt harassed by having his name revealed pursuant to the Right-to-Know statute as that of a doctor who performed abortions. He suggested that one alternative for him might be to cease providing this service. Plaintiffs' Exhibit 2.

4. Prior to the enactment of the Abortion Control Act of 1982, it was the policy of the Department of Health of the Commonwealth of Pennsylvania to separate abortion records submitted by each facility licensed in the Commonwealth from the cover sheet which identified the facility. This policy was "to avoid the possibility that certain facilities and physicians could be pressured and

possibly harassed by members of the public objecting to the medical abortion practice." Plaintiffs' Exhibit 7. It was the position of the Department of Health "that patient care may suffer if physicians or abortions clinics are under harassment. . ." *Id.*

5. The Pennsylvania Abortion Control Act became law on June 11, 1982 and was scheduled to go into effect 180 days thereafter.

6. Section 3207(b) states

Reports—Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, which shall be open to public inspection and copying, containing the following information:

(1) Name and address of the facility.

(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of \$500 for each day it is in violation hereof. 18 Pa. Cons. Stat. Ann. § 3207(b).

7. Section 3214(f) states

Report by facility—Every facility in which an abortion is performed within the Commonwealth during any

quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during the quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. These reports shall be available for public inspection and copying. 18 Pa. Cons. Stat. Ann. § 3214(f).

8. Section 3202(d) states

Right of conscience—It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions. 18 Pa. Cons. Stat. Ann. § 3203(d).

9. The Bureau of Alcohol, Firearms and Tobacco investigated 30 bombings of abortion clinics and counseling centers in the years 1982, 1983, and 1984, twenty-four of which occurred in 1984. Plaintiff's Exhibit 9.

10. In a statement on January 3, 1985, President Reagan condemned the bombings of abortion clinics as violent, anarchist activities and directed the Justice Department to step-up its investigation of the attacks. Plaintiff's Exhibit 8.

11. Margaret K. Ross, Director of Educational Programs at Hillcrest Women's Medical Centers testified at the hearing on February 7, 1985. Ms. Ross testified in a candid, forthright manner and I found her to be a credible witness.

12. Hillcrest operates five medical facilities, two in the District of Columbia; one in Baltimore, Maryland; one in York, Pennsylvania, and one in Harrisburg, Pennsylvania. Tr. 12.

13. In the past year, the frequency of demonstrations at the Harrisburg Hillcrest Center has escalated as has the telephone harassment of the clinic. Telephone harassment includes calls to schedule bogus appointments. Tr. 15-16.

14. Security at the Harrisburg Hillcrest Center has been increased at the expense of the clinic. Tr. 17.

15. The York Hillcrest clinic opened on August 29, 1984. Protests were held that date both in front and behind the facility by pro-life groups. A group of people numbering approximately 150 paraded up and down the sidewalk and at times remained stationary blocking the entrance to the clinic. Tr. 20-22.

16. From nine to fourteen people were in the back of the building throughout the day on August 29 and would yell at cars entering and leaving the parking lot as well as try to prevent the cars from moving. Tr. 23-24.

17. On September 8, 1984, the protest outside the York Hillcrest clinic was repeated. A cameraman with an instacamera from WGCB-TV Channel 49 filmed events

throughout the day and in particular focused the camera on persons entering and leaving the clinic. Tr. 26.

18. On September 8, 1984, a crowd at the back of the clinic harassed a young woman and two of her friends as they exited the clinic. The young woman had just had an abortion during which she had had an IV sedation. The crowd taunted the three women as they got into a car. The driver of the car hooked bumpers with another parked car which simply fueled the crowd to make comments such as "It looks pretty bad, but it's not as bad as what you just did in there." At this point, the patient got out of the car and tried manually to unhook the bumpers threatening physical injury to herself. Throughout this period, she was crying and becoming increasingly upset. Tr. 30-31.

19. On that same day, Ms. Ross had to go to a shopping center and pick up a prospective patient and her parents because they did not want to be identified by any community members because they feared reprisal. Tr. 34.

20. The York Hillcrest clinic has escalated its security by installing infrared eyes and on occasion hiring an armed private security guard. Tr. 35.

21. On November 2, 1984, the Court of Common Pleas for York County granted a temporary injunction against the protestors at the request of the York Hillcrest Center limiting the number of protestors at the clinic to five known persons. Tr. 35-36.

22. On November 3, 1984, the protestors violated the terms of the injunction by appearing in large numbers at the clinic and resuming their previous protest. The York

Police, who were apprised of the situation told Ms. Ross that the temporary injunction was unenforceable. Tr. 37.

23. On January 1, 1985, the Hillcrest clinic in southwest Washington, D.C. was bombed. Tr. 38.

24. After that incident, at least one physician who performed abortions at the York Hillcrest Center refused to continue to perform procedures at the clinic for fear that the Clinic would be bombed. Two other physicians who perform abortions at the Harrisburg Hillcrest Center have refused to travel to the York Hillcrest Center out of fear of public reprisal and personal injury. Tr. 38-39.

25. The Hillcrest Women's Medical Centers advertise their services through the yellow pages of the telephone directory, through mailings of brochures to schools, referral agencies, and physicians. Prior to the opening of the York clinic, press statements were released to the effect that abortion services would be provided. Tr. 40-41.

26. Mary Banecker testified at the hearing on February 7, 1985 and because she testified in a candid and straightforward manner, I found her to be a credible witness.

27. Ms. Banecker is an administrator at the Northeast Women's Center in Northeast Philadelphia. Northeast provides abortion services along with other gynecological services. Tr. 52.

28. Protests have been held outside the clinic on the public sidewalk almost every Saturday since May, 1981. Tr. 53.

29. Since November 1984, the character of these protests has changed and become more intense. More people

are involved and they yell at the staff members by name, calling them murderers and mercenaries.

30. Prior to November 1984, protests included protestors yelling at patients' comments like "They're going to rip your baby's arms off. They're going to suck your baby's eyes out," causing patients to enter the clinic in tears. Tr. 57-8.

31. Protestors also distributed literature which contained pictures of aborted fetuses to persons entering and leaving the building in which the clinic is located. Plaintiff's Exhibits 10 and 11.

32. On the Saturday before Thanksgiving 1984, three people went to the clinic waiting room and started to distribute literature to persons sitting in the room. After they were told that they were trespassing, they slowly left the building. Tr. 60.

33. On December 8, 1984, there was another incident inside the clinic. About 50 people stormed into the clinic building and upstairs into the clinic. Several protestors pushed their way through to the recovery room where they scattered pro-life literature and put stickers reflecting a fetus on the sheets under the pillows and on a number of supply items. Tr. 63.

34. Despite several requests by clinic staff members for the protestors to leave, they remained stationary while some sang. Tr. 64.

35. One lab technician, Maryann Cass, was injured when some of the protestors tried to get into the lab where she was taking blood. She had been repeatedly hit by the door which she tried to keep closed and sustained injuries

to her legs and back which caused her to miss two weeks of work. Tr. 64-65.

36. When the police arrived, the demonstrators continued to refuse to leave. After a final warning, the police started physically removing protestors from the clinic and placing them under arrest. Ultimately 31 persons were arrested. Tr. 65-66.

37. In the summer of 1983, the Northeast Center obtained an injunction from Judge Takiff of the Court of Common Pleas for Philadelphia enjoining pickets of more than six persons at a time and enjoining any abusive threats aimed at persons entering or leaving the clinic. Plaintiff's Exhibit 12.

38. The protestors continually violated the injunction. Northeast contacted the Sheriff's Office to enforce the injunction and paid an officer time and one-half to do so. Tr. 69.

39. The Sheriff however merely monitored the situation and never took any affirmative action to enforce the injunction. Tr. 69.

40. Pro-life protestors picketed the home of Ms. Banecker one week before the February 7, 1985 hearing carrying signs which read "Banecker's business is to butcher babies for big bucks" and "Mary Banecker, Hitler would be proud of you." Tr. 71-75.

41. The Northeast Center received three bomb threats during the month of December 1984. The clinic was evacuated at the time of one threat because a 45-minute deadline was given. One patient was under gen-

eral anesthesia at the time and woke up outside the building. Tr. 75.

42. Northeast Women's Center advertises its abortion services in the yellow pages, several newspapers, and on the radio. The Northeast Center also publishes a resource directory which is sent to physicians and referral agencies. Tr. 74-76.

43. Access to the Northeast Center is unlimited, and people are free to walk into the building in which the clinic is located and into the clinic itself. Tr. 79.

44. Elizabeth Lincoln, Director of Counselling and Training for Women's Health Services, Incorporated, testified at the hearing on February 7, 1985. I found her to be a candid and credible witness who qualifies as an expert in counselling, capable of testifying about the impact on women of passing through anti-abortion demonstrations before having abortions procedures or counselling.

45. Abortions are performed at Women's Health Services on Tuesdays, Fridays, and Saturdays. On the weekdays, two people routinely appear at the clinic to pass out leaflets against abortion. On Saturdays, before the Supreme Court decisions in 1983, a number of passive protestors would demonstrate outside the clinic. They would pray, chant or sing, and say the rosary. Tr. 94.

46. Since 1983, the demonstrators have become more aggressive in yelling and calling out to patients entering and leaving the clinic. The signs that are carried at these demonstrations have become much more graphic and contain pictures of fetuses or various cut-up doll parts with

signs reading "pro-choice meats." Plaintiffs' exhibits 14-21.

47. Women's Health Services has installed a sophisticated electronic security system and on Saturdays employs an off-duty police officer. Tr. 98.

48. Women's Health Services has also hired additional personnel to sit out in the hallway to ensure that no protestors enter the clinic and to ensure that patients arriving are not being hassled by protestors. Tr. 98.

49. During the past year, a pro-life person was able to break into the Services' phone lines through a CB radio and would interrupt phone calls to the clinic and would tell callers not to make appointments. Because the clinic was concerned that protestors might be able to copy information that a prospective patient gave over the telephone, the clinic ceased making appointments by telephone until they had new equipment installed to inhibit break-ins from other sources. Tr. 99-100.

50. One bomb threat was received at Women's Health Services during the last year. Tr. 100.

51. In her expert opinion which I credit, Ms. Lincoln testified that the impact of demonstrations like those occurring outside the Womens' Health Services clinic on women entering the clinic to obtain an abortion is to make the experience much more difficult for them by making them feel more socially isolated and sometimes increasing their feelings of guilt and sense of trauma. Tr. 101-103.

52. Ms. Lincoln also testified that the long-term effect on women is to lengthen the time it takes them to

resolve their emotional feelings about the abortion procedure.

53. Ms. Lincoln, in connection with the incident behind the York Hillcrest clinic involving the young woman who had just undergone an abortion and was then subjected to harassment by a pro-life crowd as she left the clinic, testified that she believes that the woman would suffer lifelong effects of the trauma to which she was subjected. Tr. 107-108.

54. Womens' Health Services advertises in the newspaper, yellow pages, and on the radio. Tr. 107-108.

55. Sylvia Stengle, Director of the Allentown Women's Center, testified at the February 7th hearing in a candid and forthright manner, and I found her to be a credible witness.

56. Allentown Women's Center performs first trimester abortions. The Center opened in October 1978. Tr. 118.

57. Since the Center opened there have been frequent Saturday pickets at the Center.

58. The intensity of these pickets increased in the early fall 1984. Tr. 118.

59. On October 6, 1984, there was a demonstration at the Allentown Women's Center orchestrated by Bishop Welsh of the Roman Catholic Diocese with much advanced publicity and meetings with the press. Nearly 450 protestors picketed on that day outside the clinic. No abortions were performed on October 6, 1984 because it was Yom Kippur. Tr. 119.

60. On October 13, 1984, one week later, the protest was repeated by about 40 people. The confrontational level that day was high with protestors snapping pictures of patients entering and leaving the clinic and jumping in front of cars with placards. Patients upon entering the clinic through the demonstration were visibly upset and distressed. Tr. 120-121.

61. A woman, representing herself as a reporter for the Wilkes-Barre paper went to the clinic to interview Ms. Stengle and then asked questions about how long Ms. Stengle had been killing babies. It turned out that although she had been a stringer for the paper, the woman was not on assignment at the time and was a pro-life supporter. Tr. 122.

62. The Allentown Women's Center advertises its abortion services in the yellow pages, college newspapers, and mailings to physicians and social workers. Tr. 124-125.

63. Sheila Miller, clinic administrator for the Women's Suburban Clinic, testified at the February 7, 1985 hearing in a candid and straightforward manner and I found her to be a credible witness.

64. For the past eight to nine months, protests have been held outside the Clinic three days a week.

65. On July 3, 1984, about 100 demonstrators appeared outside the Women's Suburban Clinic. Thirty to forty of these individuals barged into the Clinic with their arms in front of them blocking passage of anyone who wanted to get to the door or to stop them. Protestors started harassing the clients telling them not to kill their

babies. It took the police two and one-half hours to remove all of the protestors. Outside another 100 demonstrators continued to picket. Nineteen people were arrested. Two state legislators, Peter Vroon and Joseph Pitts accompanied the pickets outside and supported the activity of those who entered the building. Tr. 133-36; Plaintiffs' Exhibits 22-27.

66. On July 10, 1984, there was another demonstration by approximately fifteen people, several of whom tried to get into the Women's Suburban Clinic, but the doors were locked. One patient knocked at the door crying to be let in because two anti-abortion people were "hounding" her. These two protestors had just that day been released from jail for having entered the Clinic the week before. The police again arrested these individuals. Tr. 137.

67. An injunction was entered by Judge Wood of the Court of Common Pleas for Chester County after the July 3, 1984 incident limiting the scope of the protests. A final injunction was entered on October 29, 1984.

68. One doctor who performs abortions at the Suburban Clinic has been picketed at home. Tr. 140.

69. The Suburban Clinic advertises its services in the yellow pages, local medical services directories, and by mailings to physicians.

DISCUSSION

A. *Parties' Contentions*

The present posture of this case is unusual to say the least because plaintiffs never requested a preliminary injunction as to the disclosure requirements of sections 3207(b) and 3214(f). Rather, they opposed a stay of the proceedings as to the two provisions. I ordered a stay of the proceedings pending the appeal to the Supreme Court in order to avoid breaking this case into too many discrete pieces with the proviso that enforcement of the disclosure requirements of §§ 3207(b) and 3214(f) be enjoined. The proviso on the stay was the equivalent of a temporary restraining order necessitating a hearing before I could impose a preliminary or final injunction. This hearing was held on February 7, 1985.

At oral argument on April 11, 1985, plaintiffs argued that this aspect of the case is ripe for final disposition and that a permanent injunction would be appropriate at this stage. I am concerned, however, with making this case more complex than it presently is and want to avoid making piecemeal final orders. Moreover, the Commonwealth opposes a permanent injunction at this time. Therefore, the question presently pending before me shall be treated as a request by plaintiffs for a preliminary injunction, and the standards generally applied when considering a request for a preliminary injunction will be applied.

Plaintiffs contend that the disclosure requirements of sections 3207(b) and 3214(f) impose a legally significant burden on a woman's fundamental right to seek an abortion or abortion counselling and on the physicians and

staff members who provide abortion procedures and counselling. Disclosure under these provisions, plaintiffs claim, will substantially interfere with the right to free association, the right of privacy to make personal decisions, and the right of informational privacy. Therefore, because disclosure would threaten the free exercise of constitutionally protected rights, plaintiffs argue, the state must justify such disclosure with a compelling state interest that is substantially related to the information disclosed.

Defendants contend that no burden is imposed by the disclosure requirements on a woman's right to obtain an abortion. Moreover, defendants claim, the disclosure requirements are justified by important state interests including ensuring that shoddy practitioners do not hide behind the corporate veil, aiding citizens in the exercise of their first amendment rights to oppose abortion, providing a pool of statistical and medical knowledge, and protecting the public's freedom to choose medical providers in accordance with their beliefs.

B. *Standard for Preliminary Injunction*

The granting or denial of a request for preliminary injunction is ordinarily discretionary with the trial judge. This discretion is necessary because of the "infinite variety of situations which may confront" the court. *A.L.K. Corp. v. Columbia Pictures Indus., Inc.*, 440 F.2d 761, 763 (3d Cir. 1971). A preliminary injunction is an extraordinary and drastic remedy. The power to issue an injunction must be used sparingly, and relief should not be granted except in rare instances in which the law, the facts, and equities are clearly in the moving party's favor.

See Wright & Miller, Federal Practice & Procedure, § 1948, at 428-29 (1973).

To prevail on a motion for a preliminary injunction, the moving party must demonstrate: (1) that he is likely to prevail on the merits of the controversy, and (2) that he will be irreparably harmed *pendente lite* unless the motion is granted. In addition, the court should take into account, when relevant, (1) the possibility of harm to other interested parties from the grant or denial of the injunction, and (2) the public interest. Essentially, the court must balance the existing interests. *Oburn v. Shapp*, 521 F.2d 142, 147-8 (3d Cir. 1975).

C. Likelihood of Success on the Merits

Plaintiffs must demonstrate a *prima facie* case showing a reasonable probability that they will prevail on the merits. *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1970). Plaintiffs, therefore, must establish that there is a reasonable probability that the disclosure requirements of §§ 3207 (b) and 3214(f) will impose a legally significant burden on a fundamental right such as a woman's right to obtain an abortion. If a legally significant burden is established, the state must justify the disclosure requirements by a compelling state interest. If no burden is established, the issue is simply whether the state has a rational basis for requiring disclosure of the information obtained from the abortion facilities.

Beginning with *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court has recognized that the fundamental constitutional right of privacy encompasses the right of a woman to decide whether or not to terminate her pregnancy. See *City of Akron v. Akron Center for Reproduc-*

tive Health, 103 S. Ct. 2481, 2487, (1983); *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 291 (3d Cir. 1984). Courts have also consistently recognized that, because abortion is a medical procedure requiring the advice and assistance of competent, trained medical personnel, a woman, to fully vindicate her fundamental rights, needs to have available to her a physician who is free to exercise his or her best medical judgment. *City of Akron*, 103 S. Ct. at 2491; *American College*, 737 F.2d at 291. Regulations affecting physicians and abortion clinic staff members potentially interfere a woman's right to obtain an abortion and woman's right to associate with the medical and counselling services necessary to effectuate the abortion decision.

In *Roe v. Wade*, the Court held that no compelling state interest justifies a sweeping prohibition of abortion and further concluded that during the first trimester of the pregnancy, little or no regulation is permissible. Even minor regulations on the abortion procedure may not interfere during the first trimester with physician-patient consultation or with the woman's choice between abortion and childbirth. *City of Akron*, 103 S. Ct. at 2493. At the same time, the Supreme Court has held that the right to privacy which includes a woman's right to terminate her pregnancy, while fundamental, is not absolute and the woman's fundamental right must be balanced against important state interests in abortion. *Roe*, 410 U.S. at 154; *City of Akron*, 103 S. Ct. at 2491.

Two state interests which may justify state regulation of abortion have been identified by the Supreme Court. First, a state has an important and legitimate interest in

protecting potential life. This interest, however, cannot become compelling until viability, *i.e.*, when the attending physician concludes that there is a reasonable likelihood of the fetus's sustained survival and meaningful life outside the womb. The second identified interest is the state's concern in maternal health which the *Roe* court concluded does not become compelling until "approximately the end of the first trimester of pregnancy." *Roe*, 410 U.S. at 163.

With these principles in mind, my first inquiry must be whether the disclosure requirements of sections 3207(b) and 3214(f) impose a legally significant burden on a woman's fundamental right to obtain an abortion. Plaintiffs contend that the compelled disclosure of the identity and location of facilities at which abortions are performed; the identity and location of their parent, subsidiary or affiliated organizations and corporations; and the total number of abortions performed at each facility and the number in each trimester as required by §§ 3207(b) and 3214(f) will subject women who seek medical services from those entities and their physicians and staff members to unwanted and unwarranted acts of violence, threats, intimidation and harassment from opponents of abortion. By subjecting women and their physicians to hostile acts by third parties opposed to abortion, the disclosure, plaintiffs contend, will have the effect of intruding both upon a woman's right of association with her medical personnel and upon her right of privacy in deciding whether or not to have an abortion. Plaintiffs further argue that compelled disclosure infringes upon the right of informational privacy.

Three years ago when I considered these same provisions, I concluded that plaintiffs had not established that

disclosure would impose a legally significant burden on the abortion decision. *American College*, 552 F. Supp. 791, 803-4 (E.D. Pa. 1982). Similarly, the Third Circuit concluded that plaintiffs (appellants) had not "as yet demonstrated a nexus between the disclosure of such information [§ 3207(b)] and the chilling of constitutional rights." *American College*, 737 F.2d 283, 297 (3d Cir. 1984). Much has happened in the intervening three years and plaintiffs provided sufficient evidence at the February 7, 1985 hearing for me to conclude that the disclosure provisions would impose a legally significant burden on a woman's fundamental right to obtain an abortion.

During the past year, a Presidential election year, abortion became a hotly contested political issue. As the evidence adduced at the hearing shows, pro-life protests have increased in frequency and intensity and at times have exploded into violent confrontations. In 1984, there were twenty-four bombings of abortion clinics nationwide compared with six in the previous two years combined. Several of plaintiffs' witnesses testified about takeovers of clinics by pro-life demonstrators which have resulted in arrests of up to thirty people at a time. Women entering and leaving clinics have been verbally harassed; the effect of such harassment has been to increase the level of anxiety a woman feels and to exacerbate any emotional problems associated with the abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter. The Pennsylvania Department of Health recognized in 1980 that "patient care may suffer if physicians or abortion clinics are under harassment." Plaintiff's Exhibit 7. The pattern of hostile behavior which

has developed in the past two years has also included picketing and verbal harassment of clinic physicians and staff members by name both at their facilities and at their homes and attempts to block ingress and egress at facilities.

Conceding that some women may have experienced "heightened anxiety and guilty feelings," defendants nevertheless contend that plaintiffs failed to provide any evidence that a woman's right to obtain an abortion would be obstructed or impeded by disclosure. Defendants further contend that because the majority of facilities which perform abortions, including the five clinics about which there was testimony at the hearing, advertise the availability of their services, plaintiffs cannot establish that the disclosure requirements of § 3207(b) and 3214(f) impose a legally significant burden on a constitutional right. Even if physicians who perform abortion procedures in their offices, accounting for 4% of the abortions in the Commonwealth in 1983, do not advertise and would discontinue providing abortions if subjected to the disclosure provisions, defendants contend, there would be no legally significant impact on a woman's right to obtain an abortion.

Relying on a line of cases in which the Supreme Court has adopted a flexible standard of proof where disclosure requirements are challenged, plaintiffs argue that a finding of a "reasonable probability" that the threats, intimidation, or harassment may result from disclosure of information is sufficient to warrant a conclusion that public disclosure will impose an legally significant burden on a woman's fundamental right to obtain an abortion. In *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), the Court, holding that evidence of specific incidents of private and government hostility towards the

Socialist Workers Party and its members during the four years preceding trial was sufficient to establish that disclosure would chill first amendment rights of association, the Court specifically rejected the position that direct proof that disclosure of information would subject the individuals to threats, intimidation or harassment was necessary. Rather, the Court, adopting the test set forth in *Buckley v. Valeo*, 424 U.S. 1, 72 (1976) stated: "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisal from either Government officials or private parties." 459 U.S. at 93. The Court, therefore, declared unconstitutional an Ohio statute requiring every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (In light of evidence of past incidents of retaliation upon disclosure, compelled disclosure of the NAACP's membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort.)

Each of the cases arose in the context of minority political organizations seeking protection from reprisal, threats, and violence. For this reason, defendants contest plaintiffs' reliance on them and contend that they address problems unique to minor political parties which have demonstrated a long history of official and unofficial oppression. In contrast to the right of political advocacy at issue in *Brown* and *NAACP*, defendants note, the right to obtain an abortion has been qualified. Moreover, defendants argue, plaintiffs here are simply advancing their

right to do business and the right of their patrons to take advantage of the services they offer.

I conclude that the flexible standard of proof established in *Buckley* and *Brown* for cases involving challenges to disclosure provisions is applicable here and, therefore, defendants' arguments must be rejected.¹ That the right to obtain an abortion is not absolute and is subject to certain qualification does not render the *Brown* standard inapplicable. As counsel for plaintiffs argued, one must look to how the right to obtain an abortion has been qualified and in particular must recognize that in the first trimester the right to obtain an abortion is absolute. Furthermore, the concern reflected in the Court's decisions in *Brown* and *Buckley* to the effect that it is frequently difficult to prove a direct impact on the exercise of constitu-

1. When reviewing my earlier decision as to the disclosure requirements of § 3207(b), the Third Circuit stated:

Appellants have not as yet demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights. therefore we find inapposite *Brown v. Socialist Workers '74 Campaign Committee*, 103 S. Ct. 414 (1982), on which appellants rely, where the Court held that compelled disclosure of party contributor lists may reasonably lead to harassment based on associational ties.

737 F.2d at 297-98. I interpret this language to mean that because plaintiffs had not presented any evidence showing any nexus or relation between disclosure and the chilling of constitutional rights, the question of whether or not the standard of proof set forth in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 93 (1982) applied was never reached. Now, plaintiffs have established such a relation and the questions are whether disclosure would impose a legally significant burden on the fundamental right to obtain an abortion which can only be justified by a compelling state interest and to what standard of proof plaintiffs are to be held in establishing that burden. I have concluded that *Brown* and *Buckley v. Valeo*, 424 U.S. 1 (1976) provide the answer to the second issue.

tional rights by future enforcement of a statute that requires public disclosure of otherwise private information applies equally here.

It would be unreasonable to require plaintiffs to produce the testimony of a woman who if forced to pass through a crowd of heckling protestors would decide not to have an abortion or the testimony of a woman who has already been the target of protestors because to do so would be to subject these women to the very public scrutiny which they wish to avoid. Similarly, a physician who willingly performs abortions but who would not do so if his practice were disclosed to those opposed to abortion is likely to refuse to testify.

Applying the *Brown* standard, I conclude that there is a reasonable probability that the disclosure requirements will result in increased threats, harassment, or reprisals and will therefore impose a legally significant burden on the constitutional right to choose to have an abortion.²

2. My conclusion here is not intended to reflect in any way on the rights of those opposed to abortion to espouse their views. Although it is implicit in the conclusion that disclosure requirements impose a legally significant impact on the right to obtain an abortion that the actions of the protestors interfere with a woman's right to decide whether or not to terminate her pregnancy, the conclusion that disclosure requirements are unconstitutional has no bearing on the protestors' rights to continue to espouse their views on abortion publicly, outside clinics, hospitals, physicians' offices or elsewhere. As Judge Wood noted when entering a permanent injunction on October 29, 1984 against a number of people who had demonstrated against abortion at the Woman's Suburban Clinic, the infringement on a woman's right to obtain an abortion must be balanced against the first amendment rights of those opposed to abortion. *Woman's Suburban Clinic v. Roberta Nelson, et al.*,

(Continued on following page)

Plaintiffs have clearly shown past harassment of women seeking abortions and of physicians, staff members and clinics which provide abortion services.

The evidence shows a pattern of increased protests and hostility at each of the clinics about which there was testimony; the protests have, at times, led to violence and the protestors have shown a marked disregard for court-issued injunctions. The clinics have been forced to increase security at their own expense. Yet despite the increased security, incidents like that at Northeast Center in December, 1984, where a bomb threat was received and because of the time deadline the clinic was evacuated and one patient who had been under a general anesthetic awoke on a guernsey in the parking lot, still occur. As the expert testimony of Ms. Lincoln showed, a woman forced to pass through a crowd of heckling, hostile people, to enter a facility to obtain an abortion suffers heightened anxiety and guilt feelings which may not only affect the medical procedure itself but also cause long-term effects on her mental state. The Commonwealth has long recognized this fact, Plaintiffs' Exhibit 7, and produced no evidence to the contrary at the February 7 hearing. Moreover, hostility like that displayed by many protestors outside a clinic in-

(Continued from previous page)

No. 84-04888, slip op. (Court of Common Pleas of Chester County, Pennsylvania, October 29, 1984). The Commonwealth, however, may not adopt the first amendment rights of those opposed to abortion as its justification for state compelled disclosure when disclosure of the information required by sections 3207(b) and 3214(f) will have the likely effect of increasing the burden caused by anti-abortion activity. Therefore, there is no constitutional right balancing against the infringement on woman's right to have an abortion.

trudes on a woman's right to decide for herself whether or not she is going to have an abortion.

Disclosure of information such as that which must be reported pursuant to sections 3207(b) and 3214(f) would provide groups opposed to abortion with a comprehensive list of all facilities in the Commonwealth at which abortions are performed, the number of abortions performed by each in total and by trimester, and the name and address of any parent, subsidiary or affiliated organizations, corporations, or associations which would otherwise not be available. Defendants contend, however, that because the five clinics about which there was testimony at the hearing advertise the availability of abortion services, plaintiffs cannot establish that disclosure will impose a legally significant burden on a woman's right to obtain an abortion.³ Although plaintiffs might have been able to

3. In their supplemental memoranda of law, the parties debate the question of which party bears the burden of proof with respect to advertisement. Plaintiffs contend that advertisement is a matter of defense and therefore the burden was on the defendants to produce evidence that all of the facilities, hospitals and physicians that perform abortions advertise. Defendants, on the other hand, contend that advertisement goes to the burden disclosure will impose on the right to obtain an abortion and therefore the burden of proof is on the plaintiffs to establish that there are providers of abortions who do not presently advertise and who would be adversely affected by public disclosure. I have concluded that defendants are correct that advertisement is an element of the "burden" imposed by disclosure and therefore is an element for the plaintiffs to establish, but I do not believe plaintiffs' failure to produce direct evidence on the issue of advertisement is detrimental to their case. In fact, I would expect plaintiffs to have the greatest difficulty in presenting evidence as to the effect of disclosure in a case where the probability of harm from disclosure is greatest. If disclosure will not have any adverse consequences, witnesses will readily come forward, but if disclosure will have an undesired or adverse effect, the witnesses will be reluctant to subject themselves to the same public exposure which the disclosure would cause.

produce some evidence about the number of facilities (including hospitals and physicians) which perform abortions and do not advertise the fact, I do not believe the failure to do so is detrimental to their position. First, it would be inconsistent with the *Brown* standard to require plaintiffs to produce the testimony of a physician, clinic or hospital staff member who does not presently advertise who would discontinue providing abortion services if the disclosure provisions were enforced.

Furthermore, defendants argument that even if all physicians ceased performing in-office abortions, there would be no appreciable effect on a woman's ability to obtain an abortion because physicians provide only 4% of the abortions performed in the Commonwealth must be rejected. Virtually all abortions performed by physicians in their offices are first term abortions for the obvious reason that abortions in later stages of pregnancy are more complicated; in the years 1975 through 1977, of the 3,088 abortions performed in physicians' offices all but eight ($\frac{1}{4}$ of 1%) were performed prior to the 13th week of gestation. As the Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2492-3 (1983) stressed, even "minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation." Directly or indirectly causing any physician to cease performing abortions is an interference with the physician-patient consultation and restricts the number of facilities performing abortions.

Moreover, disclosure compelled by sections 3207(b) and 3214(f) pertains to information beyond that generally disclosed through advertisement. In addition to the name

and address of each facility, the name and address of any parent, subsidiary or affiliated organizations, corporations or associations, have contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility, and information about the total number of abortions performed per quarter as well as the total number of abortions performed per trimester will be revealed. This breadth of information goes far beyond the informational contained in a listing in the yellow pages or an advertisement in a newspaper.

Finally, if the information required by §§ 3207(b) and 3214(f) is available from other sources such as advertising as defendants claim, the Commonwealth cannot justify compelled disclosure even on a rational relation test. If for instance opponents of abortion already know of every facility which performs abortions, the names of any affiliated organizations and the applicable statistical information, public disclosure is rendered useless.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Supreme Court upheld certain recordkeeping requirements noting that "[r]ecord-keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." The Court specifically relied upon the fact that the records and reports were not be disclosed to the general public: "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." *Id.* at 81. Unlike the reporting provisions in *Danforth* which imposed no

burden on abortion facilities or women seeking abortions and which merely required the facilities to maintain confidential reports which could be inspected by state officials or opened to public health officials for purposes of gathering statistical information, sections 3207(b) and 3214(f) require disclosure of information which adversely impacts upon the physicians who provide the services and imposes a legally significant burden on the right to obtain an abortion.

Once it is determined that disclosure would result in a legally significant burden on the fundamental right to obtain an abortion, the burden shifts to the defendants to justify the burden by compelling state interest substantially related to the information to be disclosed. Defendants have proffered several justifications for disclosure which will be examined in *seriatim*.

Defendants devote the lion's share of their initial memorandum to arguing that disclosure pursuant to §§ 3207(b) and 3214(f) is justified by the state's compelling interest in facilitating the first amendment rights of those opposed to abortion. Defendants conclude that it is difficult to imagine a state interest of greater magnitude than facilitating the exercise of constitutional rights. I am seriously concerned about the ramifications of the argument defendants are advancing here and for several reasons, I decline to accept it.

The Supreme Court has identified only two state interests which may justify regulation of abortions: protection of potential life and concern over maternal health. *City of Akron*, 103 S. Ct. at 2491-2. Neither of these interests encompasses facilitating the rights of those opposed to abortion.

In support of their contention that aiding citizens in exercising their first amendment rights is a compelling state interest, defendants rely upon *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) in which the Court held that the owner of a large shopping complex could not preclude a particular group from distributing pamphlets and soliciting petition signatures. In *Pruneyard*, however, the Court concluded that there was no taking of property without just compensation and therefore no infringement of a constitutional right by the state law which promoted and facilitated the exercise of free speech. In this case, I have found that there is an infringement on the constitutional right to obtain an abortion. Moreover, in *Pruneyard*, the Court was considering a statute which provided a forum in which persons could exercise their first amendment rights, *i.e.*, the shopping plaza, whereas the disclosure under consideration here provides the content for the expression or exercise of first amendment rights.

Defendants also contend, relying on *Harris v. McRae*, 448 U.S. 297 (1980), that the Commonwealth has a legitimate interest in encouraging protests, demonstrations and the like which have the effect of influencing women to choose childbirth over abortions. In *Harris*, the Court held the Hyde Amendment, which precludes the use of any federal funds to reimburse the costs of abortions under the Medicaid program except in certain specified circumstances, constitutional. In so holding, the Court concluded that even though the effect of the amendment was to favor childbirth over abortion by means of subsidization of one and not the other, the amendment was not unconstitutional because it imposed no governmental restriction on

access to abortions. *Harris*, 448 U.S. at 297. See also *Maher v. Roe*, 432 U.S. 464, 475-76 (1977) (Citing "the basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.") Unlike the passive action in refusing to fund abortion through Medicaid, disclosure, which will increase the likelihood of threats, harassment, and reprisal against women seeking abortions and against physicians and staff members providing them, is an affirmative action by the Commonwealth which interferes with the fundamental right to decide whether or not to have an abortion. Moreover, I am seriously disturbed by the Commonwealth's reasoning that it can support or foster one point of view when to do so will be to interfere with another group's constitutional rights.

Defendants also contend that the line of cases in which the Supreme Court has held that disclosure is permissible to further the government's interest in deterring illicit activities apply in this case. Relying on *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1960), defendants argue that the Commonwealth has a compelling interest in exposing to public view associations which, by their concealment, risk the enlistment of unknowing support.⁴ In *Communist Party*,

4. The Commonwealth's interest in exposing to public view associations which by their concealment may run the risk the enlistment of public support is set forth in 18 Pa. Cons. Stat. Ann. § 3202(d) which states:

(d) Right of conscience.—It is the further public policy of the Commonwealth of Pennsylvania to respect and pro-

(Continued on following page)

the Court was concerned with people involuntarily assisting an organization involved in foreign-directed conspiracy which posed a potential threat to national security. A fundamental flaw with defendants' reliance on these cases is the implication that abortion itself is an illicit activity which of course it is not.

Defendants endeavor to overcome this flaw by arguing that the illicit activity is the activity of shoddy practitioners. While I am mindful that I must not substitute my judgment for that of the legislature, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) and I recognize the Commonwealth's concern about shoddy practitioners, I have been presented with no evidence to convince me that the disclosure of the information required by §§ 3207(b) and 3214(f) will deter or reveal shoddy practitioners. Moreover, that this disclosure will have the desired result does not follow so logically from the requirements that the Commonwealth is relieved of its

(Continued from previous page)

protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons, and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

obligation to provide supporting evidence.⁵ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). The information required pertains only to parent, subsidiary and affiliated organizations and the number of abortions performed; it will reveal nothing about the quality of the service provided. If it becomes apparent that a particular facility or physician is providing services of below average quality, the Commonwealth will have available to it the name and address of any parent, subsidiary or affiliated organizations and will be able to track the "shoddy practitioner" behind the corporate veil. This should be sufficient to further the Commonwealth's interest in deterring shoddy practitioners. Moreover, the Commonwealth's interest is served by the enforcement of medical licensing statutes which do not require public disclosure of the names and addresses of abortion facilities.

The final interest the Commonwealth proffers to justify the disclosure requirements is the need for accurate detailed statistical information. While this interest is tangentially related to the identified interest in protecting maternal health and potential life, it does not rise to the level of a compelling interest sufficiently related to

5. Addressing the issue of the disclosure requirement of § 3207(b), the Third Circuit held "[s]ince there has been no showing of any effect of the disclosure on the abortion decision, and the state has proffered the important justification that the provision will help insure that shoddy practitioners may not hide behind the corporate veil, we reject appellants' challenge." *American College*, 737 F.2d at 298. It is important to note that the court did not find that the concern about shoddy practitioners was a compelling state interest substantially related to disclosure. The court had no need to apply this test because the plaintiffs had not yet "demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights." *Id.*

disclosure to justify disclosure.⁶ If state policy-makers or courts need access to this information, the Commonwealth can provide it without making it generally available to the public. Moreover, the Department of Health has recognized that it has no need to match the identity of the facility with its statistical report. Plaintiffs' Exhibit 7. It follows, therefore, that there is no compelling state interest justifying disclosing the information in this form to the general public.

Irreparable Harm

Once plaintiffs have shown a likelihood of success on the merits by showing the likelihood of an unconstitutional infringement on the right to obtain an abortion, the irreparable harm *pendente lite* requirement is satisfied. Because plaintiffs have established for purposes of a preliminary injunction that disclosure pursuant to §§ 3207(b) and 3214(f) will impose a legally significant burden on the right of a woman to obtain an abortion, they have met the irreparable injury requirement.

Another factor in considering whether to issue a preliminary injunction is the rights of the non-moving party. Because plaintiffs have demonstrated a likelihood of success on the merits, the rights of the non-moving party are overcome by the possibility of irreparable harm to a fundamental constitutional right. In addition to the rights of the non-moving party, I have considered the public interest. Because the public has an interest in both the

6. It is important to emphasize that plaintiffs are not contesting the reporting provisions of §§ 3207(b) and 3214(f). Rather, their challenge is restricted to the disclosure requirements of these two provisions.

fundamental individual rights and the legislative process, public interest favors a resolution consistent with my decision on the likelihood of success.

CONCLUSIONS OF LAW

Accordingly, I make the following conclusions of law:

1. The jurisdiction of this court is properly invoked.
2. Plaintiffs have established a reasonable probability that they will prevail on the merits.
3. Plaintiffs have established that they will suffer immediate irreparable injury if the preliminary injunction is not granted.
4. There is neither public interest nor a threat of irreparable injury to another interested party which is sufficient to defeat plaintiffs' request for preliminary relief.

/s/ DANIEL H. HUYETT, 3rd,
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 82-4336

AMERICAN COLLEGE OF OBSTETRICIANS
AND GYNECOLOGISTS, PENNSYLVANIA
SECTION, et al.

v.

RICHARD THORNBURGH, et al.

ORDER

NOW, June 17, 1985, for the reasons stated in the attached findings of fact, discussion and conclusions of law, IT IS ORDERED that:

Defendants are enjoined preliminarily and until final determination of this matter from enforcing the disclosure provisions of 18 Pa. Cons. Stat. Ann. §§ 3207(b) and 3214(f) and reports filed pursuant to §§ 3207(b) and 3214(f) will be maintained in confidence by the Commonwealth and will not be made available for public disclosure.

/s/ DANIEL H. HUYETT, 3rd,
Judge

PENNSYLVANIA DEPARTMENT OF HEALTH

JUNE 12, 1985

(LOGO) NEWS RELEASE

HEALTH DEPARTMENT RELEASES 1984
ABORTION DATA

HARRISBURG, June 10—The number of abortions reported in the commonwealth has declined for the fourth

year in a row, the state Health Department said today, but the number performed on Pennsylvania women increased.

In 1984, there were 59,258 abortions performed, compared to a total of 59,288 performed in 1983. This represents a decrease of only 0.1 percent from 1983, but is a 9.9 percent decrease from the 1980 total of 65,777. There were 62,701 performed in 1981 and 60,772 performed in 1982.

Of the total number of abortions performed in the commonwealth, 56,462 were performed on Pennsylvania residents. This represents an increase of 1.3 percent from the 1983 figure of 55,726. Residents of other states and territories accounted for 2,786 and residents of other countries accounted for 10.

Nearly all abortions last year—53,588 or 90.4 percent—were performed within the first three months of pregnancy (first trimester). In 1983, 92.1 percent of all procedures were performed within the first three months of pregnancy. Second trimester procedures increased from 4,480 in 1983 to 5,522 in 1984.

Patients age 19 and under accounted for 16,149 of the abortions performed. This was 27.3 percent of the total, a decrease of 187 (1.1 percent) from 1983. As in previous years, the largest single age group was 20-24, accounting for 21,307—or 36.0 percent—of all 1984 abortions.

Of those patients living in Pennsylvania, almost a third—30.9 percent, or 17,453—were residents of Philadelphia. Other counties with a large number of resident abortions included Allegheny with 9,625; Montgomery with 3,477; Delaware with 3,280; and Bucks with 2,792. Of the

67 counties in Pennsylvania, 29 showed a decline in the number of resident abortions performed from 1983 to 1984.

As of December 31, 1984, there were 150 facilities in the commonwealth approved by the Health Department to perform abortions, as required by the Abortion Control Act. They all submitted the required reports for 1984.

#

1984 PENNSYLVANIA INDUCED ABORTION REPORT

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA BY AGE OF WOMEN JANUARY-DECEMBER 1984		INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA BY COMPLICATIONS AND CONDITIONS JANUARY-DECEMBER 1984	
AGE	NUMBER		NUMBER
10 or Less	0	NO COMPLICATIONS	
11	1	OR CONDITIONS	58,369
12	29	COMPLICATIONS	
13	150		
14	543	Hemorrhage	41
15	1,263	Infection	268
16	2,100	Uterine Perforation	36
17	3,019	Cervical Laceration	25
18	4,355	Retained Products	232
19	4,689	Other	118
20-24	21,307		
25-29	12,250	CONDITIONS DISCOVERED	
30-34	6,040		
35-39	2,768	Rubella Disease	6
40-44	640	Hydatid Mole	16
Over 44	53	Endocervical Polyp	5
Unknown	51	Malignancy	1
		Other	141
TOTAL	59,258	TOTAL	59,258

40a

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA
BY LENGTH OF PREGNANCY
JANUARY-DECEMBER 1984

WEEKS OF GESTATION	WEEKS ELAPSED FROM FIRST DAY OF LAST MENSTRUAL PERIOD	NUMBER
0-8	0-10	35,979
9-10	11-12	12,443
11-12	13-14	5,166
13-15	15-17	3,757
16-20	18-22	1,701
21-24	23-26	64
25+	27+	5
Unknown		143
TOTAL		59,258

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA
BY PROCEDURE
JANUARY-DECEMBER 1984

ABORTION PROCEDURE	NUMBER
Suction Curettage	56,177
Sharp D & C	2,003
Intra-Uterine Saline Instillation	845
Intra-Uterine Prostaglandin Instillation	149
Hysterotomy	0
Hysterectomy	2
Other	50
Unknown	32
TOTAL	59,258

41a

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA
BY RESIDENCE OF WOMEN
JANUARY-DECEMBER 1984

COUNTY	NUMBER	COUNTY	NUMBER
Adams	161	Montgomery	3,477
Allegheny	9,625	Montour	54
Armstrong	167	Northampton	847
Beaver	612	Northumberland	197
Bedford	70	Perry	80
Berks	1,116	Philadelphia	17,453
Blair	236	Pike	28
Bradford	15	Potter	3
Bucks	2,792	Schuylkill	358
Butler	459	Snyder	67
Cambria	397	Somerset	118
Cameron	3	Sullivan	8
Carbon	167	Susquehanna	12
Centre	576	Tioga	42
Chester	1,826	Union	70
Clarion	93	Venango	124
Clearfield	199	Warren	27
Clinton	94	Washington	725
Columbia	133	Wayne	53
Crawford	180	Westmoreland	1,200
Cumberland	722	Wyoming	39
Dauphin	1,352	York	944
Delaware	3,280	Unknown	99
Elk	42	TOTAL	
Erie	251	PENNSYLVANIA	56,462
Fayette	423		
Forest	9	OTHER STATES	
Franklin	82	Delaware	340
Fulton	4	Maryland	62
Greene	96	New Jersey	1,336
Huntingdon	53	New York	46
Indiana	276	Ohio	182
Jefferson	105	West Virginia	735
Juniata	31	Other States	69
Lackawanna	426	Unknown States	16
Lancaster	1,230	SUBTOTAL—STATES	
Lawrence	147	OTHER THAN PA	2,786
Lebanon	334		
Lehigh	1,078	SUBTOTAL—OTHER	
Luzerne	680	COUNTRIES	10
Lycoming	296		
McKean	13	TOTAL OUT-OF-STATE	2,796
Mercer	150		
Mifflin	88	TOTAL ALL	
Monroe	348	ABORTIONS	59,258

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA
BY COUNTY OF PROCEDURE
JANUARY-DECEMBER 1984

COUNTY	NUMBER	COUNTY	NUMBER
Adams	—	Lackawanna	—
Allegheny	16,526	Lancaster	1
Armstrong	—	Lawrence	—
Beaver	17	Lebanon	37
Bedford	—	Lehigh	3,972
Berks	309	Luzerne	29
Blair	16	Lycoming	54
Bradford	16	McKean	—
Bucks	238	Mercer	1
Butler	—	Mifflin	3
Cambria	—	Monroe	322
Cameron	—	Montgomery	4,685
Carbon	—	Montour	34
Centre	112	Northampton	98
Chester	3,058	Northumberland	—
Clarion	—	Perry	—
Clearfield	—	Philadelphia	19,523
Clinton	—	Pike	—
Columbia	17	Potter	—
Crawford	—	Schuylkill	—
Cumberland	4	Snyder	—
Dauphin	6,494	Somerset	6
Delaware	3,233	Sullivan	—
Elk	—	Susquehanna	2
Erie	—	Tioga	—
Fayette	—	Union	13
Forest	—	Venango	2
Franklin	—	Warren	—
Fulton	—	Washington	20
Greene	—	Wayne	—
Huntingdon	7	Westmoreland	20
Indiana	—	Wyoming	—
Jefferson	—	York	389
Juniata	—		
		TOTAL	59,258